Supreme Court, U.S.
FILED
93-1188 JAN 18 1994
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1993

ROGER E. WOOLSEY,

Petitioner,

v.

NATIONAL TRANSPORTATION SAFETY BOARD and FEDERAL AVIATION ADMINISTRATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

SCHNEIDER & MCKINNEY

W. TROY MCKINNEY
11 Greenway Plaza, Suite 3112
Houston, Texas 77046
(713) 961-5901

Attorney for Petitioner, Roger E. Woolsey

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

97 pp

QUESTION PRESENTED

1. The improperly applied definition of "common carriage" affirmed below conflicts with both the applicable federal statutes and regulations under the Federal Aviation Act of 1958, 49 U.S.C.App. § 1301 *et seq.*, and the accepted comon law definition of the term, violates the First Amendment rights of all commercial air operators, and, if allowed to stand, will eliminate a significant segment of the commercial air industry in the United States.

LIST OF PARTIES

Roger E. Woolsey (petitioner here and appellant below).

National Transportation Safety Board (respondent here and appellee below).

Federal Aviation Administration (respondent here and appellee below).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTES 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

1. THE DEFINITION AFFIRMED BELOW CONFLICTS WITH BOTH THE APPLICABLE FEDERAL STATUTES AND REGULATIONS AND THE ACCEPTED COMMON LAW DEFINITION OF THE TERM, VIOLATES THE FIRST AMENDMENT RIGHTS OF ALL COMMERCIAL AIR OPERATORS, AND, IF ALLOWED TO STAND, WILL ELIMINATE A SIGNIFICANT SEGMENT OF THE COMMERCIAL AIR INDUSTRY IN THE UNITED STATES 4

2. THE REVOCATION OF WOOLSEY'S COMMERCIAL PILOT'S LICENSE PURSUANT TO A DEFINITION OF COMMON CARRIER NOT ADOPTED IN CONFORMITY WITH THE ADMINISTRATIVE PROCEDURE ACT SHOULD BE SUMMARILY REVERSED 12

TABLE OF CONTENTS – Continued

Page

3. THIS CASE IS PARTICULARLY SUITED FOR A GRANT OF CERTIORARI BASED ON THE ISSUE PRESENTED, THE RECORD AVAILABLE, AND THE WIDESPREAD POTENTIAL FOR HARM TO AMERICA'S COMMERCIAL AIR OPERATORS.. 13

CONCLUSION 15

APPENDICES:

Appendix A: Opinion issued by the United States Court of Appeals for the Fifth Circuit on June 23, 1993 ..... 1a

Appendix B: Denial of Petition for Rehearing and Rehearing En Banc by the United States Court of Appeals for the Fifth Circuit on August 18, 1993 ..... 33a

Appendix C: Opinion issued by the National Transportation Safety Board on August 28, 1991..... 35a

Appendix D: Transcript from the record of the Oral Initial Decision and Order of the administrative law judge given July 24, 1991..... 47a

Appendix E: Advisory Circular No. 120-12A issued April 24, 1986 by the U.S. Department of Transportation, Federal Aviation Administration..... 56a

Appendix F: Selected portions of the United States Code and the Code of Federal Regulations..... 61a

TABLE OF AUTHORITIES

Page

CASES

Arrow Aviation, Inc. v. Moore, 266 F.2d 488 (8th Cir. 1959) 8

Batterton v. Marshall, 648 F.2d 694 (D.C.Cir. 1980) 13

Buchanan v. Stanships, Inc., 485 U.S. 265 (1988) 10

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 13

Consolo v. Federal Maritime Commission, 383 U.S. 607 (1966) 13

Curtiss-Wright Flying Service, Inc. v. Glose, 66 F.2d 710 (3d Cir.), *cert. denied*, 290 U.S. 696 (1933) 9

Gallant v. Gorton, 581 F. Supp. 909 (D. Mass. 1984) 8

Home Insurance Co. v. Riddell, 252 F.2d 1 (5th Cir. 1958) 6, 8

Jackson v. Stancil, 116 S.E.2d 817 (N.C. 1960) 8

Kansas City Southern Railway Co. v. United States, 282 U.S. 760 (1931) 10

Las Vegas Hacienda, Inc. v. C.A.B., 298 F.2d 430 (9th Cir. 1962) 9

Louisville & Nashville Railroad Co. v. United States, 282 U.S. 740 (1931) 9, 10

National Association of Regulatory Utility Commissioners v. Federal Communications Commission, 533 F.2d 601 (D.C. Cir. 1976) 8

Semon v. Royal Indemnity Co., 279 F.2d 737 (5th Cir. 1960) 8, 9

State v. Department of Transportation, 868 F.2d 441 (D.C. Cir. 1989) 13

TABLE OF AUTHORITIES – Continued

Page

Terminal Taxi Cab Co. v. Kutz, 241 U.S. 252 (1916) 8

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc., 425 U.S. 748 (1976) 12

Washington v. Kuykendall, 275 U.S. 207 (1927) 8

Woolsey v. National Transportation Safety Board, 993 F.2d 516 (5th Cir. 1993) 1

STATUTES, REGULATIONS, AND RULES

Administrative Procedure Act, 5 U.S.C. § 553.. 4, 5, 12, 13

Administrative Procedure Act, 5 U.S.C. § 706 13

28 U.S.C. § 1254(1) 2

Federal Aviation Act of 1958, 49 U.S.C.App. § 1301 ..... 2, 5, 15

Federal Aviation Regulations, Part 1, 14 C.F.R. § 1 5

Federal Aviation Regulations, Part 91, 14 C.F.R. § 91 ..... 5, 10

Federal Aviation Regulations, Part 121, 14 C.F.R. § 121 7

Federal Aviation Regulations, Part 125, 14 C.F.R. § 125 ..... 5, 7

Federal Aviation Regulations, Part 129, 14 C.F.R. § 129 7

Federal Aviation Regulations, Part 135, 14 C.F.R. § 135 ..... 5, 7, 10

Sup. Ct. R. 10 10

Sup. Ct. R. 14.1 2

No. _____

In The

Supreme Court of the United States

October Term, 1993

ROGER E. WOOLSEY,

Petitioner,

v.

NATIONAL TRANSPORTATION SAFETY BOARD and FEDERAL AVIATION ADMINISTRATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Roger E. Woolsey requests that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 23, 1993, and for which rehearing was denied August 18, 1993.

OPINIONS BELOW

The opinion for which review is requested is *Woolsey v. National Transportation Safety Board*, 993 F.2d 516 (5th Cir. 1993), and is reprinted in the Appendix, along with

the order denying petitioner's motion for rehearing. Sup. Ct. R. 14.1. The opinions of the administrative law judge and of the National Transportation Safety Board in this matter are also reproduced in the Appendix. *Id.*

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered on June 23, 1993. Petitioner's timely motion for rehearing by that court was denied August 18, 1993. Petitioner was granted an extension by this Court to file this Petition for Writ of Certiorari until January 18, 1994. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES

Petitioner's writ involves the application and interpretation of several parts of the United States Code and Code of Federal Regulations. Because of their voluminous nature, these provisions are set out in the Appendix. Sup. Ct. R. 14.1(f), (k).

STATEMENT OF THE CASE

This case presents a narrow legal issue requiring a single, uniform answer that only this Court can give: the definition of "common carrier" under the Federal Aviation Act of 1958 – a critical concept inexplicably left undefined. The definition advanced below by the Federal

Aviation Administration, and affirmed by the National Transportation Safety Board and Fifth Circuit Court of Appeals, distorts the statutory scheme implemented by Congress and conflicts with the accepted common law definition of the term. If allowed to stand, the FAA definition will eliminate a significant segment of the commercial air industry in this country.

The factual background in this matter is simple and largely undisputed. The FAA revoked petitioner Roger Woolsey's pilot's certificate for serving as pilot in command on flights that allegedly required operating certificates he did not possess. Woolsey personally flew country and western singer Ms. Reba McEntire, her company officials, employees, and guests, in an aircraft Ms. McEntire operated under a time share agreement with Woolsey's company, Prestige Touring, Inc. Claiming that those flights involved common carriage, the FAA issued an emergency order revoking Woolsey's pilot's license for piloting them without a Federal Aviation Regulation (FAR) Part 135 certification. Woolsey contended that no Part 135 certification was required since the challenged flights were not subject to that regulation; the flights having been conducted under the statutory exception to the Part 135 requirement found in Part 91.501.[1] As the FAA admits, and the Fifth Circuit acknowledged, the flights in question would have been governed by Part 91

---

[1] Though these proceedings originally included charges that Woolsey, on one occasion, operated an aircraft in an unsafe manner, the NTSB refused to affirm this finding by the administrative law judge and it was not part of the Fifth Circuit's opinion below. Appendix at 6a & nn.6, 7.

had common carriage not been involved. Appendix at 14a, 23a.

In the proceedings below, the administrative law judge found that Prestige Touring had engaged in common carriage, applying a definition of common carriage announced in an FAA Advisory Circular that had never been adopted as a formal rule or regulation in conformity with the Administrative Procedure Act, 5 U.S.C. § 553. Woolsey appealed to the National Transportation Safety Board, which affirmed the administrative law judge in pertinent part. Woolsey then appealed to the Fifth Circuit, which affirmed the NTSB, one judge dissenting. Woolsey now seeks review by this Court of the judgment and opinion of the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

1. THE DEFINITION AFFIRMED BELOW CONFLICTS WITH BOTH THE APPLICABLE FEDERAL STATUTES AND REGULATIONS AND THE ACCEPTED COMMON LAW DEFINITION OF THE TERM, VIOLATES THE FIRST AMENDMENT RIGHTS OF ALL COMMERCIAL AIR OPERATORS, AND, IF ALLOWED TO STAND, WILL ELIMINATE A SIGNIFICANT SEGMENT OF THE COMMERCIAL AIR INDUSTRY IN THE UNITED STATES.

In the Federal Aviation Act of 1958, Congress established a distinction between those individuals and companies who solicit and transport the general public and those who do not. The former, known as "air carriers," provide the carriage of persons or property by aircraft for

compensation or hire from one destination to another, and are subject to stringent regulatory standards concerning safety and air operations generally contained in Part 135 of the Federal Aviation Regulations (FAR), 14 C.F.R. § 135.1 *et seq.* *See* 49 U.S.C.App. §§ 1301(3), (10), (24)(a). The latter, known as "commercial operators," are defined in the negative as those persons **other than air ca iers** who likewise fly persons or property for compensation or hire from one destination to another, and must meet different, less stringent, standards. *See, e.g.*, 14 C.F.R. §§ 1.1, 91.1 *et seq.*, 125.1 *et seq.* The sole distinction between the two is whether the flight operations involve common carriage, a term not defined by either the Federal Aviation Act of 1958 or any Federal Aviation Regulation.

The FAA definition of common carriage applied below, and affirmed by the Fifth Circuit, comes from a 1986 Advisory Circular issued by the FAA, but never adopted in conformity with the Administrative Procedure Act, 5 U.S.C. § 553. The FAA defines a common carrier as one who holds itself out to the public, or to a segment of the public, as willing to furnish transportation within the limits of its facilities to any person who wants it. Appendix at 57a. The Advisory Circular gives four elements to be considered when deciding if common carriage is involved, the final three of which are redundant on the statutory definition of an air carrier: (1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation. *Compare* Appendix at 57a *with* 49 U.S.C.App. §§ 1301(3), (10), (24)(a). The FAA definition thus does not include the critical element contained in the common law definition that a carrier serve

its customers indiscriminately.[2] Thus, under the FAA's definition, the sole determining factor in deciding whether an operator is an air carrier or a commercial operator rests on whether there is a "holding out" of a willingness to furnish service for hire; air carriers may effect such a holding out, while commercial operators may not.

But the FAA's definition – which omits the requirement that a common carrier serve its customers indiscriminately – effectively eliminates the distinction between an air carrier and a commercial operator; allowing a party to remain a commercial operator only at the

---

[2] As the Fifth Circuit has explained in *Home Insurance Co. v. Riddell*, 252 F.2d 1, 4 (5th Cir. 1958):

> The salient characteristic of a common carrier is that "He must be engaged in the business of carrying goods for others as a public employment, and must hold himself out as ready to engage in the transportation of goods for persons generally . . . [and] holds himself out as ready to engage in the transportation of goods for hire as a public employment, . . . and . . . undertakes to carry for all persons indifferently. . . . " And to state it conversely, those who " . . . do not hold themselves out as willing to serve the public indiscriminately, are not common carriers". . . . [T]here has been no such holding out if, in the regular operation of that business, the carrier by act and deed, with or without words, claims to and exercises the right to fix specific rates in each individual case basing the charges not on a regular schedule (whether formally filed as tariffs or otherwise), but on contemporary judgment of the moment. For this is an effectual announcement that the carrier will discriminate, will undertake transportation differently, not indifferently.

expense of their First Amendment right to free speech. If a commercial operator undertakes any method to inform any potential client of their services, or indeed if the potential client even learns of the operator's services from any third party source, the commercial operator becomes engaged in common carriage and is therefore now an air carrier. In addition to the statutory anomalies engendered by this "distinction," the dissenting judge in the Fifth Circuit recognized the substantial First Amendment problem it created.[3] Thus, because the sole differentiating factor in the definition of common carriage (the distinction between an air carrier and a commercial operator) is the question of "holding out," any First Amendment activity which the FAA chooses to characterize as "holding out" transforms a commercial operator into an air carrier and subjects it to the license revocation imposed on Woolsey. The issue is therefore not *which* commercial operators could be affected by the FAA's definition as affirmed by the Fifth Circuit – *all are.*[4] See Appendix at 27a-28a.

---

[3] In his dissent below, Judge DeMoss characterized this as the "unanswerable conundrum" now presented to a commercial operator by the FAA's definition (Appendix at 27a):

> How can I engage in my business of carrying persons or property for compensation or hire as a commercial operator in air commerce, if by simply holding myself out to prospective customers I became engaged in "common carriage" which makes me an air carrier subject to regulation under entirely different sets of regulations?

[4] As are all persons or entities whose status depends on the definition of common carrier. *See, e.g.*, 14 C.F.R. §§ 121.1(a)(5)(ii); 125.1(a); 129.1(b); 135.1(a)(3).

As Woolsey urged below, application of the common law definition of common carrier, with its emphasis on indiscriminate service to all customers as reflected by the use of a fixed rate or tariff charged, is both without the constitutional infirmity and better effectuates the purposes behind the federal statutes and regulations involved. The common law defined a common carrier as one who holds out a willingness to carry, at a fixed rate, all persons applying for air transport, so long as there is room in the aircraft. *See Jackson v. Stancil*, 116 S.E.2d 817 (N.C. 1960). Simply put, a common carrier takes all they can carry who will pay their fare, a fare not distinguished based upon who is the passenger. *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 533 F.2d 601, 608-09 (D.C. Cir. 1976); *Semon v. Royal Indemnity Co.*, 279 F.2d 737, 739 (5th Cir. 1960); *Arrow Aviation, Inc. v. Moore*, 266 F.2d 488, 490 (8th Cir. 1959); *Gallant v. Gorton*, 581 F. Supp. 909 (D. Mass. 1984). That fixed fare or tariff is the linchpin of the requirement that a common carrier serve its customers "indiscriminately." *See Home Insurance Co. v. Riddell*, 252 F.2d 1, 4 (5th Cir. 1958). The FAA definition omits this key facet.

Indeed, it is the indiscriminate service factor, with its emphasis on the fixed nature of tariffs or charges, that has been the focus of this Court's prior decisions involving common carriage. Thus, in *Terminal Taxi Cab Co. v. Kutz*, 241 U.S. 252, 255-56 (1916), Justice Holmes noted "the mechanical fixity of charges" in deciding whether the taxicab company was a common carrier, and as such, subject to rate regulation by the Public Utilities Commission of the District of Columbia. Likewise in *Washington v. Kuykendall*, 275 U.S. 207, 209-212 (1927), this Court

spent one-quarter of its four-page opinion detailing the uniform charges assessed by the tow boat operators who were challenging their status as common carriers and the resultant regulatory jurisdiction asserted over them by the Washington Department of Public Works.[5]

Perhaps most closely analogous to the instant matter were the facts of *Louisville & Nashville Railroad Co. v. United States*, 282 U.S. 740 (1931), in which this Court

---

[5] Below, the FAA (when convenient) distinguished petitioner's cases as either not involving aviation, or not concerning aviation safety (as opposed to economic) regulation. Indeed the Fifth Circuit majority itself was caught by the definitional doublespeak, first rejecting case authority from outside the aviation context, and then accepting the FAA's position that cases involving the *economic* regulation of air carriers by the now-abolished *Civil Aeronautics Board* might be appropriate support for defining common carriage under *FAA safety* regulations. In doing so, however, the majority relied on the Ninth Circuit's opinion in *Las Vegas Hacienda, Inc. v. C.A.B.*, 298 F.2d 430 (9th Cir. 1962), which explicitly rejected such an extrapolation, *id.* at 436-37. All such confusion would be eliminated if the common law definition given above were applied. As the Fifth Circuit itself once noted, "There is scarcely any field of law more ancient or more written on than that of carriers. So in solving this insurance case, it is not surprising or disturbing that 'we must work with ancient markers whose general fitness is reflected by their adaptability to the changing world of commerce and transportation.' " *Semon v. Royal Indemnity Co.*, 279 F.2d 737, 739 (5th Cir. 1960), quoting *Home Insurance Co. v. Riddell*, 252 F.2d 1, 2 (5th Cir. 1958). Thus it has been with the common law definition of common carriage moving from land to water to air transportation. *See Curtiss-Wright Flying Service, Inc. v. Glose*, 66 F.2d 710, 712 (3d Cir.), *cert. denied*, 290 U.S. 696 (1933). Indeed, the FAA itself recognized the applicability of the common law definition when it adopted its version. Appendix at 57a.

reviewed the determination of common carrier status for railroads transporting office cars of other carriers – cars "occupied exclusively by officers and employees of the company owning the car and traveling upon business in connection with the operation of their own railroad," *see Kansas City Southern Railway Co. v. United States*, 282 U.S. 760, 761 (1931). This case likewise presents the operation of a similar "company plane" exception from the definition of common carriage. *See* 14 C.F.R. 91.501(b)(6) (exception advanced below by Woolsey which excludes the transport of company officials, employees, and guests on an airplane operated under a time sharing, interchange or joint ownership agreement from FAR Part 135 regulation). Critical to this Court's finding in *Louisville & Nashville R. Co.* that the practice at issue was subject to Interstate Commerce Commission regulation was the fact that uniform minimum tariffs were collected by the carriers for transport of the allegedly private cars. *See Louisville & Nashville R. Co.*, 282 U.S. at 744-45 n.3, 748. Here, the carriage of company officials, employees and guests – specifically excepted from regulation as common carriage – was independently negotiated and not invoiced on a fixed rate or tariff basis.

The record in this matter also demonstrates the clear violation of all operators' First Amendment commercial speech rights by enforcement of the FAA definition.[6]

---

[6] Petitioner Woolsey recognizes this is not a Court of error correction. Sup. Ct. R. 10; *cf. Buchanan v. Stanships, Inc.*, 485 U.S. 265, 269 (1988) (Marshall, J., dissenting). The merits are discussed only insofar as is necessary to show the truly microscopic modicum of proof the FAA required before instituting this emergency revocation proceeding and upon which the Fifth Circuit affirmed.

Under the FAA definition, only a single example of what the FAA decrees to be advertising to a relevant market segment is needed for a company or individual to lose their livelihood. See Appendix at 57a-58a (listing ways "holding out" can be found).[7] Even taking as correct the findings below regarding what constituted "advertising" [for example, the magazine article written by a third party reporter which simply *mentioned* Prestige Touring Inc.], **none** of the subject "proof" at issue here evidenced a common law holding out to any segment of the public of a willingness by Prestige Touring Inc. to furnish air transportation to the limits of its facilities to any person who wanted it on an indiscriminate basis. The limitation which the FAA's definition thereby places on the free speech rights of commercial operators is undeniable. Simply put, had there been no First Amendment activity, Woolsey could not have been found guilty. Indeed, the FAA **admitted** that the flights in question here would be governed by Part 91 if common carriage were not involved. Appendix at 14a, 23a. The FAA definition therefore acts as a complete prohibition on the free speech rights of commercial operators.

---

[7] Though the Fifth Circuit noted the slippery slope nature of this problem, the solace it found in dismissing it is illusory. Appendix at 22a n.24. The guardian which the Fifth Circuit claimed would protect commercial operators from the widespread harm created by application of the FAA definition was the requirement a carrier serve its customers "indiscriminately." *Id.* But as noted above, the FAA definition in fact removes the linchpin for the determination of indiscriminate service – the use of a fixed charge or tariff – which emasculates the guardian.

It was just this sort of restriction that this Court invalidated in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748 (1976). In *Virginia Pharmacy*, this Court affirmed that the indispensable needs of our free enterprise system require the free flow of commercial information, and thus speech retains its First Amendment protection even if it does nothing more than propose a commercial transaction. *Id.* at 761-65. As in *Virginia Pharmacy*, the FAA definition used here acts to completely suppress a commercial operator's right to disseminate truthful information regarding its services. **By definition,** any advertising makes the commercial operator an air carrier. Appendix at 27a. As noted above the issue is therefore not *which* commercial operators could be affected by the FAA's definition as affirmed by the Fifth Circuit – *they all are.* Appendix at 27a-28a. The wholesale elimination by definition of the "commercial operator" segment of the aviation industry in this country – as illustrated by what happened to petitioner Woolsey – requires corrective action by this Court.

2. THE REVOCATION OF WOOLSEY'S COMMERCIAL PILOT'S LICENSE PURSUANT TO A DEFINITION OF COMMON CARRIER NOT ADOPTED IN CONFORMITY WITH THE ADMINISTRATIVE PROCEDURE ACT SHOULD BE SUMMARILY REVERSED.

It is undisputed that the FAA's definition of "common carriage" in Advisory Circular No. 120-12A, was not adopted as a rule or regulation through the public notice and comment procedures required by the Administrative Procedure Act (APA), 5 U.S.C. § 553. Appendix at

61a-62a. But to have its definition of "common carriage" supersede the long-standing common law definition, the agency should have adopted it through the rule making process described in the APA. *See State v. Department of Transportation*, 868 F.2d 441, 445-47 (D.C. Cir. 1989) (finding D.O.T. actions concerning advertising by airlines which "shape and channel agency enforcement" must be adopted through the formal procedure of the Act). This the FAA failed to do, never justifying its failure with any showing required to evade the Act. *Cf.* 5 U.S.C. § 553(b)(3)(B); *Batterton v. Marshall*, 648 F.2d 694, 704 (D.C. Cir. 1980). By taking away Woolsey's pilot's license pursuant to a definition of common carriage never properly adopted, the FAA's actions violated Section 706(2)(A)-(D), making summary reversal appropriate. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971); *cf. Consolo v. Federal Maritime Commission*, 383 U.S. 607, 621 (1966).

3. THIS CASE IS PARTICULARLY SUITED FOR A GRANT OF CERTIORARI BASED ON THE ISSUE PRESENTED, THE RECORD AVAILABLE, AND THE WIDESPREAD POTENTIAL FOR HARM TO AMERICA'S COMMERCIAL AIR OPERATORS.

For 35 years Congress and the FAA have failed to formally define common carrier; this Court is the only other body that can give the uniform definition necessary for this nation-wide industry. Although the issue is a narrow legal question, the implications of the erroneous definition upheld below reach far beyond the injustice done Roger Woolsey. The question has been properly preserved and is clearly presented by a complete record.

Indeed, far from this being a "fact bound" controversy, the minuscule quantum of evidence which sufficed to create common carriage here particularly illustrates the nature of the slippery slope opened by the opinion below and the potential for disaster.

Nor should the issue be left to "percolate" in lower courts. The defining of this statutory term does not present a volatile circumstance such that great benefit can be gained from allowing several courts throughout the country to address it. Meanwhile, the lives and livelihood of all commercial operators, and their employees, hinge on the proper definition of "common carrier," and the willingness of those operators to forgo their right to free speech.

In addition, the procedural difficulties faced by future litigants means that few, if any, will persevere the arduous administrative process, as well as a dual set of appeals through both agency and circuit court, to eventually reach this Court's door. Any stop at any point along the way, whether through attrition or victory, will preclude this Court from the opportunity to review this issue in the future. And review by this Court is uniquely required for any satisfactory resolution to this issue; this is the only judicial forum that can give the necessary uniform answer for application across the country. In an industry that involves interstate commerce stretching between areas overseen by differing courts of appeal, percolation and "circuit splits" in the application of so basic a question are simultaneously devastating to future litigants and easily (and only) remedied by an opinion of this Court.

CONCLUSION

The history behind this action led one Fifth Circuit judge to note his belief that the Federal Aviation Administration had decided to make Roger Woolsey the scape goat for an air crash he had no part in and for which he bears no responsibility.[8] In its lust to punish Woolsey, the FAA has set a precedent which will detrimentally reverberate throughout the air transportation industry in this country, presenting commercial operators with a choice between free speech and loss of livelihood. The narrow legal issue presented is the definition of common carriage under the Federal Aviation Act of 1958; a question properly presented on an illustrative record and for which only this Court can give a satisfactory answer. Petitioner Roger Woolsey requests this Court grant his petition for writ of certiorari to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

SCHNEIDER & MCKINNEY

W. TROY MCKINNEY
11 Greenway Plaza, Suite 3112
Houston, Texas 77046
(713) 961-5901

Attorney for Petitioner,
Roger E. Woolsey

---

[8] Appendix at 5a, 32a. The FAA's charges against Woolsey arose after its investigation of a crash by another Prestige pilot which killed many of the members of Ms. McEntire's band; a crash Woolsey was not responsible for and which was not one of the flights challenged as improper in this particular action.

APPENDIX A

Roger E. WOOLSEY, Petitioner,

v.

NATIONAL TRANSPORTATION SAFETY BOARD and Federal Aviation Administration, Respondents.

No. 91-4904.

United States Court of Appeals,
Fifth Circuit.

June 23, 1993.

President of air carrier appealed order of the National Transportation Safety Board, which affirmed revocation of his commercial pilot's certification. The Court of Appeals, Goldberg, Circuit Judge, held that evidence supported finding that carrier was common carrier.

Affirmed.

DeMoss, Circuit Judge, dissented and filed opinion.

J. Scott Hamilton, Louisville, CO, for Roger E. Woolsey.

Edmund J. Averman, III, Atty., Peter J. Lynch, Manager, Enforcement Proceedings Branch, Washington, DC, for National Transp. Safety Bd. & FAA.

Petition for Review of an Order of the National Transportation Safety Board.

Before GOLDBERG, JONES, and DeMOSS, Circuit Judges.

GOLDBERG, Circuit Judge:

We embark on a journey into the lofty area of aviation safety regulation. Previous navigators have left powerful beacons along the way to guide us. The law in this area is not too far up in the air. We may encounter a few clouds of doubt, but they will dissipate. We anticipate a smooth flight before descending to our final destination.

Roger E. Woolsey appeals an order of the National Transportation Safety Board ("NTSB") which affirmed the FAA's revocation of his commercial pilot's certification due to his failure to comply with the safety requirements for pilots operating aircraft for a common carrier under Part 135 of the Federal Aviation Regulations ("FAR), 14 C.F.R. § 135. Neither the Federal Aviation Act of 1958, 49 U.S.C.App. § 1301 et seq., nor the regulations promulgated, thereunder, define the term "common carrier." Woolsey disputes the definition used by the FAA and the NTSB. He claims that the aircraft he piloted were not operated in common carriage, and hence that the less stringent safety requirements of FAR Part 91 should have been applied by NTSB. He also contends that the NTSB erred in affirming the administrative law judge's admission into evidence of certain documents pertaining to the marketing efforts of Prestige Touring, Inc. ("PTI"). We find that the NTSB's interpretation of the term "common carrier" as applied to air carriers was correct, and that the fact finding of the NTSB was supported by substantial evidence even without reference to the documents Mr. Woolsey sought to have excluded.

Roger E. Woolsey is president of Prestige Touring, Inc. ("PTI"), a small air carrier which specializes in transporting musicians. Prior to entering into an agreement to

transport the country musician Reba McEntire for a minimum of several hundred hours per year, PTI marketed itself primarily to rock musicians, with whom it had at least twenty-five contracts in 1990.[1] Although Woolsey claims that PTI makes "individualized decisions in particular cases whether and on what terms to serve . . . [and] does not furnish transportation indiscriminately, but furnishes it only to those with whom it sees fit to contract," there is no evidence that PTI ever turned away anyone in the music industry who applied to it for air transportation and was willing to pay its fee.

Woolsey became aware in the late 1980s of the fact that most country musicians travel by bus, and he determined to take advantage of that largely untapped market. In 1989, Woolsey sent Reba McEntire's manager (who is also her husband) information about the services offered by PTI. Although PTI engaged in self-promotion in a major periodical read by many in the music industry, Woolsey considered it important to make direct contact with stars like McEntire in order to expand from "rock" into the country music segment of the music industry.

---

[1] In a "thank you note" to twenty-five of its clients in the music industry which was published in an issue of the weekly magazine *Performance International*, PTI proclaimed, "Prestige Touring, Inc., is the #1 air support company [for the music industry] in the United States." The twenty-five artists listed in the "thank you note" were: Reba McEntire, Billy Joel, Ricky Skaggs, Larry Gatlin & The Gatlin Brothers, the Jerry Garcia Band, Duran Duran, Chicago, Kiss, Alice Cooper, Clint Black, Europe, Arron Tippon, Cinderella, Robert Plant, Whitesnake, Jimmy Buffett, U2, Depeche Mode, Stevie Nicks, the Judds, Don Williams, Sawyer Brown, Chet Atkins, the Grateful Dead, and Garrison Keillor.

Shortly after the "press kit" sent by PTI to McEntire's manager arrived, an agreement was negotiated by Reba's Business, Inc. ("Reba's Business") and PTI, whereby PTI agreed to transport McEntire and her entourage for a fee for a minimum number of hours of flight time per year.[2] An additional standard hourly fee was to be levied for any flight time over and above the minimum hours specified in the contract. PTI agreed to provide a specific aircraft for the exclusive use of McEntire and her guests. PTI painted Reba McEntire's name and that of her son, Shelby Blackstock, on the fuselage of the airplane. McEntire and her guests were permitted to leave their personal belongings on the plane at all times. PTI agreed to McEntire's request that flights be made from the airport in Gallatin, Tennessee, which was more conveniently located for McEntire than the Nashville airport at which PTI originally intended to provide her with service.[3] PTI rented an apartment in the Gallatin, Tennessee area, in

---

[2] The fee was structured so as to comply with the requirements of FAR Part 91. However, Woolsey admitted that the fee he charged McEntire in this case was lower than that he charged some of the rock musicians with whom he had contracts (understood to be governed by FAR Part 135), because he hoped to promote PTI's entry into the "country and western" market.

[3] The change of airports entailed a reduction in the level of safety available, because the Gallatin airport's runway was shorter. It is unclear from the record whether the significance of that safety reduction was explained to McEntire or her manager when they negotiated the change of airports. It appears that operations under FAR Part 135 are not permitted to be conducted at the Gallatin Airport. We note, however, that the change of airports does not appear to have factored into the FAA's decision to revoke Mr. Woolsey's certification.

order that a flight crew would be available to transport Ms. McEntire on short notice.

Woolsey claims that all of the "lease agreements" between PTI and Reba's Business were intentionally designed so as to comport with the requirements of FAR Part 91, not FAR part 135. He contends that these leases constituted "time sharing agreements," which are governed under FAR Part 91 if they involve private or contract carriers. Thus, whether or not the leases comport with the requirements of FAR Part 91, the crucial question remains whether PTI acted as a common carrier with respect to the flights in question.

When another PTI airplane for which Reba's Business had contracted crashed,[4] Reba's Business ceased doing business with PTI. On July 5, 1991, a Federal Aviation Administration ("FAA") Administrator issued an emergency order revoking Woolsey's commercial pilot certificate due to his alleged violation of Section 91.13(a) of the Federal Aviation Regulations, 14 C.F.R. § 91.13(a).[5] Woolsey was alleged to have served as pilot in command on fifty-three flights for compensation without meeting the training and examination requirements of FAR Part 135. He was also alleged to have intentionally stopped an

---

[4] Ms. EcEntire was not aboard the flight, but some of her employees were.

[5] FAR § 91.13(a) provides that "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

engine during one flight in order to avoid having to stop for fuel.[6]

On July 24, 1991, after an evidentiary hearing, an administrative law judge orally affirmed the FAA Administrator's decision. Petitioner appealed to the National Transportation Safety Board, which on Aug. 28, 1991, issued an opinion affirming the administrative law judge's decision with the respect to the revocation of Woolsey's license. The NTSB refused to affirm the administrative law judge's finding that the intentional engine stoppage constituted careless or reckless endangerment of the life of property of others,[7] nevertheless concluded that "the sanction of revocation is clearly appropriate where, as here, respondent operated as pilot in command of fifty-three flights with paying passengers, to whom he owed a high standard of care, and when he did not have the necessary training, examinations and check rides required of him under Part 135 [which applies to common carriers]." The NTSB based its finding that PTI was a common carrier on the definition of that term provided in FAA Advisory Circular No. 120-12A.

Woolsey appealed the NTSB decision to this court pursuant to 49 U.S.C.App. § 1486(a).[8] PTI is not a party in

---

[6] For the reasons explained *infra*, the issue of the engine stoppage on one of the flights is not presented in this appeal.

[7] This part of the NTSB's decision is not being appealed by the FAA.

[8] 49 U.S.C.App. § 1486(a) provides:

"Any order, affirmative or negative, issued by the Board or Secretary of transportation under this chapter, except any order in respect of any foreign air

the instant case. First, we must decide whether the NTSB erred in affirming the administrative law judge's admission of certain evidence which was offered to support the Federal Aviation Administration's argument that PTI held itself out to the public as a common carrier. Second, in considering whether the comparatively stringent safety regulations of Part 135 apply (as opposed to those of Part 91), we must decide whether the flights in question were operated by Woolsey in "common carriage," a term that the Federal Aviation Regulations leave undefined.

DISCUSSION

I. THE ADMINISTRATIVE LAW JUDGE'S ADMISSION OF EVIDENCE OF PTI'S MARKETING EFFORTS

Woolsey claims that the NTSB erred in affirming the administrative law judge's admission into evidence of Exhibits A-9 through A-15, which were offered by the FAA to show that PTI had held itself out to the public.[9]

---

carrier subject to the approval of the President as provided in section 1461 of this Appendix, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failing to file the petition theretofore."

[9] Exhibits A-9 through A-15 consist of the following:
A-9: An article in *Performance International* magazine, which is a periodical published weekly and available by subscription;

Woolsey contends that these exhibits should not have been admitted because they were not authenticated by any witness with personal knowledge of them. He further contends that the failure to authenticate the documents by presenting their authors or signatories as witnesses deprived him of the right to confront and cross-examine witnesses against him.

A10: An advertisement in the form of a thank-you note from PTI to its clientele, published in *Performance International* magazine;

A-11: A facsimile transmission from the manager of the Judds, a country music duo, to FAA investigator Hall, and a cancelled check made out to Prestige Touring by the Judds' manager;

A-12: "Information packet" sent by PTI to the manager of the Judds, which claims that PTI has strict flight requirements that meet the highest Federal Aviation regulations, states that PTI specializes in serving the music business, and lists as PTI's past or current clients at least twelve major rock and country music stars, as well as the radio personality Garrison Keillor and former presidents Carter and Ford;

A-13: "Press kit" containing excerpt from a promotional "article" about PTI contained in *Performance International* magazine; cover letter from PTI to the manager of the Judds, noting that PTI has three offices in the southern United States;

A-14: Facsimile transmission sent to FAA investigator Tucker by TKO Management on that company's letterhead, and a copy of a contract between PTI and the musical group Sawyer Brown;

A-15: A letter and a check made out to PTI from Cherry Air, both of which were sent to FAA inspector Tucker by Cherry Air's president, Jim Donaldson, at Tucker's request.

The NTSB has not adopted rules of evidence. In 1986, the Administrative Conference of the United States adopted recommendations which stated that it would be improper to *require* agencies to apply the Federal Rules of Evidence. Recommendation 86-2, 1 C.F.R. § 305.86-2. The only Federal Rule of Evidence strongly recommended by the Conference for use in agency proceedings was Fed.R.Evid. 403 ("Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time"). Section 556(d) of the Administrative Procedure Act, which applies to proceedings before the NTSB, only requires the exclusion of oral or documentary evidence which is irrelevant, immaterial, or unduly repetitious. 5 U.S.C. § 556(d). *Sorenson v. National Transportation Safety Board*, 684 F.2d 683, 686 (10th Cir.1982). This standard is "somewhat lower" than that required for authentication of documents under Fed.R.Evid. 901, but nevertheless "does not completely obviate the necessity of proving by competent evidence that real evidence is what it purports to be. . . . [a]bsent, *any* such proof, the evidence to be admitted would be irrelevant or immaterial and hence should be excluded from the proceedings." *Gallagher v. National Transportation Safety Board*, 953 F.2d 1214, 1218 (10th Cir.1992) (emphasis added) (toxicological report held admissible in NTSB proceeding despite fact that chain of custody relating to body fluid sample "was somewhat compromised"; NTSB was not required to infer any deliberate acts of tampering or gross negligence in handling the evidence when none had been shown).

Although we note that a slightly lower standard for admission of documentary evidence applies in administrative proceedings than in the federal courts, we find

that admission of the documents in question would have been proper under the Federal Rules. Woolsey contends that an FAA official's testimony that he had requested and received the documents during the course of his investigation was insufficient under Fed.R.Evid. 901(b)(1) to assure that the documents are authentic. He also claims that since neither the publishers nor the authors of the telephone books, periodicals, cancelled checks, letters, lease agreements and press kits testified, he was deprived of the right as "an accused" to confront and cross-examine witnesses against him. The FAA counters that there was no danger that the documents were not what they were claimed to be, and that Mr. Woolsey had every opportunity to cross-examine the FAA investigators who testified as to the method by which the documents were obtained and stored prior to the hearing. Mr. Woolsey did not claim that any of the documents allegedly signed by his employees contained forged signatures.

Exhibits A-9 and A-10, which consist of articles and self-promotional statements made by PTI in the weekly magazine *Performance International,* are self-authenticating documents under Fed.R.Evid. 902. While Woolsey appears to admit for the first time in his Reply Brief that the documents are self-authenticating, he attempts to maintain the claim that they should not have been admitted by arguing that they were irrelevant. Specifically, Woolsey claims that the self-promotional articles in Exhibits A-9 and A-10 pertained to service provided by PTI on a turboprop airplane, operation of which is governed by FAR Part 125, and not by FAR Part 91 or 135. We find this argument unpersuasive, because the exhibits do not specifically refer to any particular type of aircraft.

We find that there was no error in the admission of Exhibits A-11 through A-15. We believe there was adequate assurance of authenticity for documents A-11 through A-15 to be admitted. All of these documents pertain to solicitation of business by PTI.[10] The documents were requested by, and sent to, FAA investigators, who were available to testify about the method in which the documents were obtained and kept by the FAA, and why it was reasonable to consider them authentic.[11] There is no evidence that the signatures on the documents were forged or that the documents were otherwise falsified; nor is there any evidence that the documents, once received by the FAA investigators, ever left the investigators' hands. Fed.R.Evid. 901(a) provides that, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The Advisory Notes following Fed.R.Evid. 901 state that testimony of witnesses having "personal knowledge," broadly construed can support the authenticity of a document.[12] We

---

[10] See *infra*, note 9.

[11] Even if this involved hearsay, "the only limit to the admissibility of hearsay [in the administrative context] is that it bear satisfactory indicia of reliability. . . . [I]t is not the hearsay nature *per se* of the proffered evidence that is significant, it is its probative value, reliability and the fairness of its use that are determinative." *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir.1980), *cert. denied*, 452 U.S. 906, 101 S.Ct. 3033, 69 L.Ed.2d 407 (1981). See also *Richardson v. Perales*, 402 U.S. 389, 407-08, 91 S.Ct. 1420, 1430-31, 28 L.Ed.2d 842 (1971).

[12] A "witness with knowledge" of a matter can be anyone from "a witness who was present at the signing of a document

do not believe that the admission of Exhibits A-11 through A-15 deprived Mr. Woolsey of "the accused's right to confront and cross-examine witnesses." All but one of the cases Mr. Woolsey cites in advancing his argument are criminal cases involving the Sixth Amendment. We consider those cases inapposite in this civil proceeding. *See Administrator v. Harrison*, 2 N.T.S.B. 504 (1973). The single civil case cited by Mr. Woolsey is *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959). That case involved an administrative proceeding in which a private individual working for a private company had his security clearance revoked by the Defense Department of the United States. The Supreme Court found that the failure to provide the employee any opportunity to confront the evidence against him or to cross-examine witnesses violated due process. In *Greene*, the government presented no witnesses and "[i]t was obvious . . . from the questions posed to petitioner and to his witnesses, that the [Industrial Employment Review Board] relied on confidential reports which were never made available to petitioner." 360 U.S. at 479, 79 S.Ct. at 1405. The petitioner in that case had no opportunity whatsoever to confront the evidence against him. In the instant case, by contrast, the FAA presented witnesses and documents which Woolsey was free to confront. Although he objected to the admission of the documents based on the absence of the persons who signed them, he

---

to [one who can testify that] narcotics [were] taken from an accused and account[ ] for custody through the period until the trial." Advisory Note Example (1). *See also Administrator v. Moore*, 2 N.T.S.B. 3216 (1981); *Administrator v. Harrison*, 2 N.T.S.B. 504, 505 (1973).

did not claim the documents were forged or altered in any way. FAA investigators were available for cross-examination as to how they obtained the documents and why it would be reasonable to conclude that the documents were authentic.

Even if admission of any of the documents in Exhibits A-11 through A-15 was error, it was harmless. There was additional evidence on which the administrative law judge and the NTSB could have based the decision to affirm the FAA's revocation of Mr. Woolsey's commercial pilot certification. There was evidence presented that PTI actively solicited McEntire's business by sending her letters and brochures; engaged in self-promotion in periodicals available to the general public;[13] publicly listed the names of scores of its clients in the music industry;[14] and advertised in the yellow pages of the telephone book.[15] We consider this to be "substantial evidence" supporting the view that PTI held itself out to the public as a common carrier.[16]

---

[13] Exhibits A-9 and A-10.

[14] Exhibits A-9 and A-10.

[15] The listing for PTI appeared under the heading "Aircraft Charter, Rental & Leasing Service."

[16] As long as the findings of fact of the Board are supported by substantial evidence, they must be affirmed. 49 U.S.C.App. § 1486(c). *See King v. Nat'l Transp. Safety Bd.*, 766 F.2d 200, 203 (5th Cir.1985) ("As an appellate court reviewing an administrative order, it is not [this Court's] function to reevaluate the weight of the evidence or to reexamine the credibility choices made by the finder of fact") *quoting Stern v. Butterfield*, 529 F.2d 407, 409 (5th Cir.1976)); *Nadiak v. Civil Aeronautics Bd.*, 305 F.2d 588, 592 (5th Cir. 1962), *cert. denied*, 372 U.S. 913, 83 S.Ct. 729, 9 L.Ed.2d 722 (1963) ("The function of a reviewing Court is to

II. DEFINITION OF "COMMON CARRIAGE" WITH RESPECT TO AIR CARRIERS; APPLICATION OF PART 135 IN THE INSTANT CASE

Woolsey contends that the contracts or "leases" for air transportation signed by himself and country music singer Reba McEntire were designed with an eye to compliance with the requirements of FAR Part 91.[17] The Federal Aviation Administration ("FAA"), however, contends that the more stringent safety requirements of FAR Part 135[18] apply. The FAA admits that the flights in question in this case would be governed by Part 91 had PTI not advertised its services and actively solicited business. The FAA contends, however, that PTI held itself out to a definable segment of the general public as being available for air carriage for compensation, and that PTI was for that reason a "common carrier." FAR Part 91 specifically excludes common carriers from its coverage, leaving them subject to the more stringent safety standards of FAR Part 135. The policy behind this distinction appears to be that the general public has a right to expect that airlines which solicit their business operate under the most searching tests of safety. The term "common carrier" is not defined in the Federal Aviation Act or the Federal Aviation Regulations. Hence, we must look to other sources (the most important of which is the common law relating to air carriers) in order to determine whether PTI

---

accept the findings of fact made by the administrative body if there is substantial evidence in the record as a whole to support those findings").

[17] 14 C.F.R. § 91.

[18] 14 C.F.R. § 135.

was a common carrier with respect to the flights in question in this case.

In response to potential confusion as to the meaning of the term "common carrier" under the Federal Aviation Act, the Federal Aviation Administration issued Advisory Circular No. 120-12A ("Advisory Circular") on April 24, 1986. The Advisory Circular provides FAA employees and members of the aviation industry with "general guidelines for determining whether current or proposed transportation operations by air constitute private or common carriage." Advisory Circular at 1. The Advisory Circular defines a common carrier as one which holds itself out to the public as being willing to transport persons or property for compensation, to the extent that its facilities permit.

Mr. Woolsey was aware of the definition of "common carriage" provided by the FAA in its Advisory Circular. However, Mr. Woolsey contends that PTI not only did not hold itself out to the public, but that the definition of common carriage contained in the Advisory Circular is too broad, does not have the force of law because it was not promulgated as a regulation under the Administrative Procedure Act, and is inconsistent with the common law definition of a common carrier. Woolsey claims that the common law defines a common carrier as one which (1) holds itself out to the public as willing to carry anyone who applies so long as there is room in the aircraft, (2) at a uniform price applicable to all who apply. He claims that PTI "furnished air transportation only to those with whom it saw fit to contract, as a private or contract carrier, and . . . any . . . "holding out" was no more than an invitation to negotiate such contracts on a case-by-case

basis, without any evidence of uniformity of charges or willingness to carry all persons applying so long as there is room in the aircraft."

Instead of focussing on whether PTI held itself out to the public, Mr. Woolsey discusses at length the nature of PTI's contracts with Reba's Business; the fact that Ms. McEntire was given exclusive use of a PTI airplane; and the fact that the contract was not for a single or even several flights, but for a year's term. In so doing, he hopes to establish that the agreement at issue here was not a charter agreement, but a "time sharing" agreement under FAR Part 91;[19] that the airplane known by air traffic controllers across the nation as "Reba Jet" was more like a private airplane than an airplane owned by a common carrier and chartered by a private party.

Woolsey notes that many of the cases defining "common carriage" as the FAA does are cases relating to economic regulation of air carriers, as opposed to safety regulation of air carriers. He contends that any relevance that these cases might have had in the area of aviation safety was decimated in 1978 by Congress' abolition of the Civil Aeronautics Board and repeal of economic regulations affecting air carriers. Airline Deregulation Act of 1978, Pub.L. No. 95-504, Section 3; 92 Stat. 1705. We do not agree that these cases "have no precedential value after 1978," nor do we agree that the term "common

---

[19] The term "time sharing agreement" is defined in Section 91.501(c) as "an arrangement whereby a person leases his airplane with flight crew to another person, and no charge is made for the flights conducted under that arrangement other than those specified in paragraph (d) of this section."

carrier" as defined in economic regulation cases has no relevance in cases concerning safety regulation. The same definition has been applied in both economic and safety regulation cases. The term "common carrier," as used in the common law, was not affected by the repeal of certain economic regulations under the Airline Deregulation Act of 1978. The mere fact that one of the bodies responsible for developing the common law definition of common carriage no longer exists is no argument for abolishing the common law definition developed while that body was in existence.[20]

We do not address the legal sufficiency of the Advisory Circular, for we find that the definition of common carrier provided therein is in relevant respect the same as that found at common law. Contrary to the assertion of Mr. Woolsey, the FAA does not seek to broaden the definition of common carriage. Mr. Woolsey seeks to narrow that definition in a manner inconsistent with the case law. He would have us hold that an air carrier engages in common carriage only when it transports all members of the public at the same price whenever it has room on its airplanes. Although there is some support for the view that a common carrier must deal on the same terms and conditions with all of its customers, *see, e.g., Semon v. Royal Indemnity Co.*, 279 F.2d 737 (5th Cir.1960) (charter of a fishing boat found to constitute private or contract carriage where there was no evidence of holding out), we

---

[20] Had Congress defined "common carriage" so as to replace the common law definition developed by the Civil Aeronautics Board and the courts, the question before us would be different.

are aware of no cases actually applying such a restrictive test to air carriers.[21]

The Advisory Circular correctly points out that the crucial determination in assessing the status of a carrier is whether the carrier has held itself out to the public or to a definable *segment* of the public as being willing to transport for hire, indiscriminately. *Las Vegas Hacienda, Inc. v. Civil Aeronautics Bd.*, 298 F.2d 430 (9th Cir.), *cert. denied*, 369 U.S. 885, 82 S.Ct. 1158, 8 L.Ed.2d 286 (1962); *East Coast Flying Serv. Enforcement Proceeding*, 46 C.A.B. 640 (1967); *M & R Inv. Co., Inc. v. Civil Aeronautics Bd.*, 308 F.2d 49 (9th Cir.1962); *Arrow Aviation, Inc. v. Moore*, 266 F.2d 488 (8th Cir.1959); *Southeastern Aviation, Inc. Enforcement Proceeding*, 32 C.A.B. 1281 (1961); *Consolidated Flower*

---

[21] In *Jackson v. Stancil*, 253 N.C. 291, 116 S.E.2d 817, 824-25 (1960), the North Carolina Supreme Court quoted two early commentators on aviation law for the proposition that "[t]he chief test applied to determine whether a carrier is a "common carrier" is whether or not the operator of the aircraft either by express written or oral statements, or by his course of conduct, holds himself out to the public as willing to carry at a fixed rate all persons applying for air transportation . . . so long as his plane or planes will carry them." However, that court went on to apply a more multivariate test for common carriage, in which the dispositive factor was not whether the carrier charged uniform rates or agreed to carry all passengers for whom its aircraft had room, but whether the carrier *held itself out to the public as being available for service.* The court specifically noted that a charter carrier "may limit its operations solely to charter flights and still be a common carrier." *Id.* 116 S.E.2d at 824. Thus, the court implicitly credited the idea that a charter carrier can qualify as a common carrier even if it does not offer to every member of the public every available seat on its aircraft, but offers various package deals to members of a defined segment of the public.

Shipments, Inc., 16 C.A.B. 804 (1953), *aff'd, Consolidated Flower Shipments v. Civil Aeronautics Bd.*, 213 F.2d 814 (9th Cir.1954); *Intercontinental Enforcement Proceeding*, 41 C.A.B. 583 (1965). The test "is an objective one, relying upon what the carrier actually does rather than upon the label which the carrier attaches to its activity or the purpose which motivates it." *Las Vegas Hacienda*, 298 F.2d at 434.

The cases which Woolsey cites in support of his definition of "common carriage" are distinguishable. Most of these cases involve definitions of common carriage developed outside the context of aviation law. *See, e.g., Terminal Taxicab v. Dist. of Columbia*, 241 U.S. 252, 36 S.Ct. 583, 60 L.Ed. 984 (1916) (taxicabs); *Semon*, 279 F.2d 737 (fishing boat); *Home Ins. Co. v. Riddell*, 252 F.2d 1 (5th Cir.1958) (trucks). We agree with the Ninth Circuit that these cases are inapposite:

> It would be wholly unjustified simply to assume that the [disputed] terms are to have the precise meaning attached to them in the definitions of the Motor Carrier Act and in the case law under that statute. . . . We have been warned of the impropriety of assuming that Congress intended that judicial precedents and rules of interpretation applicable to the regulation of other forms of transportation were to be applied to the regulation of transportation by air: "However useful parallels with older forms of transit may be in adjudicating private rights, we see no reason why the efforts of the Congress to foster and regulate development of a revolutionary commerce that operates in three dimensions should be judicially circumscribed with analogies taken over from two-dimensional transit."

Las Vegas Hacienda, 298 F.2d at 437, 439 n. 31 (*quoting Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 108, 68 S.Ct. 431, 434-35, 92 L.Ed. 568 (1948)).

The few cases cited by Woolsey which do concern aviation law are either distinguishable or only weakly support his argument in dicta. *See, e.g., Jackson v. Stancil*, 253 N.C. 291, 116 S.E.2d 817 (1960) (where appellant did not list his business in the telephone book or advertise in any other fashion, and was affirmatively sought out by a former flying student for a single incident of transportation, appellant engaged in private or contract carriage; quoting with approval two early commentators who advanced test for common carriage involving holding out, uniform tariffs, and willingness to serve all persons aircraft can accommodate, but applying more multi-faceted test for common carriage in which holding out was dispositive factor); *Seven Seas Airlines, Inc., Enforcement Proceeding*, 34 C.A.B. 45 (June 26, 1961) (noting in *dicta* that "if a carrier is not required to dedicate or assign to the exclusive use of certain patrons any particular equipment or if there is nothing to prevent a carrier from hauling with any such equipment, it has been held that the carriage is common"; but not stating that dedication of an airplane to the exclusive use of a single party *necessarily* would constitute private or contract carriage); *Scarborough v. Aeroservice, Inc.*, 155 Neb. 749, 53 N.W.2d 902 (1952) (owner of a school for airplane mechanics, who agreed to transport one of his students on a single 45-minute flight, was private carrier).

There was substantial evidence, even excluding Exhibits A-11 through A-15, on which the administrative

law judge and the NTSB could conclude that PTI had held itself out as being willing to serve all members of the music industry who were able to pay for its services.[22] Although Woolsey claims that PTI was "discriminating" about whom it would serve, there is no evidence that PTI ever turned away any member of the music industry who was able to pay PTI's fees. On these facts alone, the NTSB was justified in concluding that PTI acted as a common carrier.

Woolsey claims that because PTI does not utilize uniform tariffs, it is not a common carrier.[23] While most common carriers do utilize uniform tariffs applicable to all who apply for service, we agree with the FAA that the "absence of tariffs or rate schedules, transportation only pursuant to separately negotiated contracts, or occasional refusals to transport, are not conclusive proof that the carrier is not a common carrier." Advisory Circular at 1. *See East Coast Flying Serv.*, 46 C.A.B. at 644; *Southeastern Aviation*, 32 C.A.B. at 1284-85. The existence of a contract negotiated for a special price does not alone suffice to make the carrier a private carrier. *See, e.g., Las Vegas*

---

[22] As long as the findings of fact of the Board are supported by substantial evidence, they must be affirmed. 49 U.S.C.App. § 1486(e). *See King*, 766 F.2d at 203; *Nadiak*, 588 F.2d at 592-93.

[23] For this proposition, Woolsey relies on *Jackson v. Stancil*, 253 N.C. 291, 116 S.E.2d 817, 824-25 (1960), in which the North Carolina Supreme Court quoted with approval two early commentators on aviation law for the proposition that common carriage involves uniform pricing. However, as noted *supra*, the North Carolina Supreme Court actually applied a multifaceted test in which no single factor besides "holding out" was dispositive.

Hacienda, 298 F.2d at 434; *Intercontinental*, 41 C.A.B. at 601-02; *Southeastern Aviation*, 32 C.A.B. at 1285.

What is crucial is that the common carrier defines itself through its own marketing efforts as being willing to carry any member of that segment of the public which it serves.[24] In this case there was sufficient evidence on which the NTSB could conclude that Prestige Touring had marketed itself to numerous rock stars, and sought to enter and capture the country music industry by directly soliciting the business of country music luminaries like McEntire.

Woolsey claims he structured the contract between PTI and Reba's Business, Inc., in order to make it comport with the requirements of FAR Part 91.501 (subpart F), 14 C.F.R. § 91.501, which does not apply in conjunction with Part 135. The exception to Part 135 on which Woolsey relies is found at FAR Part 91.501(b)(6), which states that "Operations that may be conducted under the rules in this subpart instead of those in parts 121, 129, 135, and 137 of this chapter *when common carriage is not involved*, include – . . . The carriage of company officials, employees, and guests of the company on an airplane operated under a time sharing . . . agreement . . . "

---

[24] It may be objected that if the relevant "segment" of the public is defined narrowly enough, *any* carrier transporting more than one party might conceivably be found to be a common carrier. The slope is not that slippery. Only those carriers who affirmatively hold themselves out to the public, either by advertising or by a course of conduct evincing a willingness to serve members of the general public (or a segment thereof) indiscriminately, so long as they are willing to pay the fee of the carrier, will qualify as common carriers.

(emphasis added). The term "time sharing agreement" is defined in FAR Part 91.501(c)(1) as "an arrangement whereby a person leases his airplane with flight crew to another person, and no charge is made for the flights conducted under that arrangement other than those specified in paragraph (d) of this section."[25] Woolsey claims that PTI charged no more than permitted by the regulation. The FAA appears to concede in its brief that "[Subpart F] provides for certain limited exceptions to the requirement that passenger-carrying operations conducted in air commerce for compensation or hire (in the type aircraft Woolsey was using) be conducted under Part 135, the operating rules applicable to air taxi and commercial operators. If Woolsey's operations in fact met the requirements set forth in FAR § 91.501, it appears that he could have conducted those operations under the rules of that subpart, rather than under the more stringent requirements of FAR Part 135." Respondents' concession is more apparent than real, however, for the exceptions to application of Part 135 to operations like those which

---

[25] The charges permitted to be made for transportation under a time sharing agreement are as follows:

> (1) fuel, oil, lubricants and other additives; (2) travel expenses of the crew, including food, lodging, and ground transportation; (3) hangar and tie-down costs away from the aircraft's base of operation; (4) insurance obtained for the specific flight; (5) landing fees, airport taxes, and similar assessments; (6) customs, foreign permit, and similar fees directly related to the flight; (7) in-flight food and beverages; (8) passenger ground transportation; (9) flight planning and whether contract services; (10) an additional charge equal to 100% of the expenses for fuel, oil, lubricants and other additives. 14 C.F.R. § 91.501(d).

took place in the instant case would apply only with respect to private or contract carriers.

Because we have affirmed the finding of the NTSB that the aircraft used for the flights in question were operated by Woolsey in common carriage, we find that Mr. Woolsey's claim that he intended to bring these operations under Part 91 is unavailing. The objective conduct of PTI, holding out its services to the music industry and actually serving scores of different musicians, makes PTI's operations subject to FAR Part 135. The subjective intentions of Woolsey are not controlling. It is the objective conduct of himself and his corporation which bring their actions under FAR Part 135. *Las Vegas Hacienda*, 298 F.2d at 434. *See also Consolidated Flower Shipments*, 16 C.A.B. at 805 ("[A] carrier cannot divest itself of its common-carrier status by the simple expedient of entering into an agreement with its customers purporting to relieve itself of its normal liability"). The Federal Aviation Regulations are primarily designed to protect the public safety, and not the private contractual aspirations of given parties.

CONCLUSION

We have arrived at our destination: AFFIRMED.

DeMOSS, Circuit Judge, dissenting:

In my opinion, the "flight" in this case has been long and bumpy, our instruments did not work well, and I think we have landed at the wrong airport. I write this dissent to explain why.

I. *Who is a "common carrier" and when is "common carriage not involved?"*

The fundamental problem in this case is one of definitions. Neither Congress nor the Federal Aviation Administration ("FAA") have defined the term "common carriage" or "common carrier." I am amazed that this is the case. First, I feel strongly that there is a serious due process problem in a quasi-judicial proceeding, such as is involved in this case, if the revocation of a commercial pilot's license turns on the meaning of a critical term which the administrative agency has not previously defined under its rule making powers. Clearly the FAA in issuing its advisory circular that purports to define "common carriage," did not comply with the procedure for the adoption of a formal rule or regulation. And, taking away a commercial pilot's license has an economic impact on that individual very similar to a fine or jail term or taking away a lawyer's license to practice. An individual should not be deprived of their livelihood as a result of an administrative agency's ad hoc definition of a critical term.

Second, I think the meaning that the agency gives to the term "common carriage" in this case is fundamentally inconsistent with other terms that are defined by the statute and by the published regulations.

As I read the definitions set forth in the statute (49 U.S.C.App. § 1301) and in the regulations (14 C.F.R. § 1.1), the terms are defined as follows:

A. "Air carrier" is one who engages in "air transportation."

B. "Air transportation" means "interstate air transportation," "overseas air transportation," or "foreign air transportation," or the "transportation of mail by aircraft."

Each of interstate, overseas, and foreign air transportation are defined to be "the carriage by aircraft of persons or property *as a common carrier* for compensation or hire" (underlining added) plus the individual geographical definition.

C. "Air commerce" means:

1. "Interstate air commerce";
2. "Overseas air commerce";
3. "Foreign air commerce"; or
4. "Operation or navigation of an aircraft within a federal airway or directly affecting or endangering safety in interstate, overseas, or foreign air commerce."

D. Each of "interstate air commerce," "overseas air commerce," and "foreign air commerce" are defined as "the carriage by aircraft of persons or property for compensation or hire," plus the geographical definition pertinent to each one.

E. The regulations (but not the statute) contain the definition of "commercial operator" as "a person who for compensation or hire engages in carriage by aircraft in *air commerce* of persons or property, *other than as an air carrier or foreign air carrier or under Part 375.*" (underlining added.)

Under this definition structure, it is open, obvious, and clear to me that the fundamental distinction between

"air carrier" and "air transportation" on the one hand, and "commercial operator" and "air commerce" on the other hand, is that the first two involve carriage *"as a common carrier."*

Now to this set of definitions, the National Transportation Safety Board ("NTSB") on page 6 of its opinion in this case would add the definition of "common carriage" as " . . . the four elements of common carriage are:

(1) a holding out of a willingness to

(2) transport persons or property

(3) from place to place

(4) for compensation."

However, the NTSB's definition wipes out the statutorily created distinction between air transportation and air commerce; and it runs contrary to it's own definition of "commercial operator" which expressly points out that a commercial operator is one who acts "other than as an air carrier." Elements (2), (3), and (4) of the NTSB definition set out above, are the same elements referred to in the definition of both "air transportation" and "air commerce"; and the new definition creates a seemingly unanswerable conundrum for a commercial operator:

> How can I engage in my business of carrying persons or property for compensation or hire as a commercial operator in air commerce, if by simply holding myself out to prospective customers I become engaged in "common carriage" which makes me an air carrier subject to regulation under entirely different sets of regulations?

Surely there is some Constitutional right to free speech for business which would encompass making

known to prospective customers the availability of your services. Bottom-line, therefore, a stamp of approval to the NTSB's definition which might be inherent in an affirmance of this case may have implications way beyond the bounds of Woolsey's license revocation dispute which is directly involved.

II. *How does § 91.501 interrelate with § 135.1 of the applicable regulations?*

Much of the argument and discussion in this case relates to this question which is a riddle wrapped in another conundrum. Assuming that the airplanes piloted by Woolsey meet the test of being "turbojet powered, multiengined, civil airplanes" as defined in paragraph (a) of § 91.501, the first sentence of subparagraph (a) makes clear that the operation of these airplanes is covered by the rules in "this subpart, [§§ 91.501-91.533] . . . in addition to those prescribed in *other subparts of this part,*" [i.e Part 91]. Consequently, § 91.5 in subpart A of Part 91 is clearly applicable to these planes and requires compliance by the "pilot in command" with the "requirements of § 61.58 of this chapter." Section 61.58 establishes rules for periodic proficiency checks or flight checks which are similar to, but perhaps not identical with, provisions for periodic flight testing in Part 135. The Board, however, accuses Woolsey of failing to comply with the Part 135 provisions. Consequently, even if Woolsey were correct in his argument that the "time sharing agreement" in this case relieved him of the necessity of complying with the periodic performance checks in Part 135 as charged by the NTSB, he would still have to comply with § 91.5 and

§ 61.58. The record fails to show whether Woolsey did in fact comply with § 61.58 and whether the NTSB's complaint is really only as to the timing of getting those rechecks under the more frequent requirements of Part 135. If that were in fact the case, then the sanction of license revocation levied upon Woolsey is grossly out of proportion to the nature of the "wrong" that he committed. A suspension of his license for a fixed period of time or a money fine would have been the appropriate penalty if he did in fact get retested on the § 61.58 schedule rather than the Part 135 schedule. On the other hand, if Woolsey was not retested at all for periods of time longer than those required under § 61.58, then his contention that the time sharing agreement eliminates the applicability of Part 135, even if correct, would still leave him in noncompliance with §§ 91.5 and 61.58.

III. *Must the government prove that the airplanes and flights in questions were governed by Part 135 or is it sufficient that the government simply prove that Prestige Touring was not entitled to the benefits of 91.501?*

On page 6 of its opinion, the Board stated:

> The law judge found that, notwithstanding respondent's claims that he strived to conform to the requirements of Section 91.501, the overwhelming evidence established that these operations were governed by Part 135 because Prestige Touring, Inc. failed to meet the threshold requirement of not being "common carriage." We agree.

From the same opinion on page 2, it appears that Woolsey was charged with careless or reckless operation of an aircraft in violation of § 91.13(a)

> . . . by serving as pilot in command on 53 flights for compensation or hire, without meeting the training and examination requirements of §§ 135.293(a) and (b), 135.297(a), 135.299(a), and 135.343.

Clearly, these are not "criminal" proceedings. They are quasi-judicial in nature and result in the imposition of sanctions based on past actions. The Board therefore should have to prove that the flights in question were covered by Part 135. From this perspective, the finding of the law judge on page 6 of the opinion quoted above is just flat wrong. The mere fact that Prestige Touring may have failed to meet the "threshold requirement of not being common carriage" [which is part of § 91.501] certainly does not establish that Part 135 is applicable to the flights in question. As set forth § 135.1(a), the rules in Part 135 govern:

> (1) Air taxi operations conducted under the exemption authority of Part 298 of this Title;
>
> (2) The transportation of mail by aircraft conducted under a postal service contract awarded under § 5402(c) of Title 39, U.S.C.;
>
> (3) The carriage in air commerce of person or property for compensation or hire as a commercial operator (not an air carrier) in aircraft having a maximum seating capacity of less than 20 passengers or a maximum payload capacity of less than 6,000 lbs., or the carriage in air commerce of persons or property in common carriage operations solely between points entirely

> within any state of the United States, the aircraft having a maximum seating capacity of 30 seats or less and a maximum payload capacity of 7,500 lbs. or less.

In my view, none of these subparagraphs apply to the airplanes and flights which Woolsey served on as pilot in command. The first subparagraph relates to "air taxi operators"; and § 298.3(b) clearly states:

> . . . a person who does not observe the conditions set forth in paragraph (a) of this section shall not be an air taxi operator within the meaning of this part with respect to any operations conducted while such conditions are not being observed.

One of the conditions in paragraph (a) was registration with the Board in accordance with subpart (c). Nothing in the record makes reference to the registration by Prestige Touring with the Board under subpart (c) of Part 298.

Similarly, subparagraph (2) of § 135.1(a) regarding transportation of mail is not applicable because there was clearly nothing referencing the carriage of mail on any of the flights which Woolsey commanded.

There are two distinct and separate sentences to subparagraph (3) joined by the disjunctive "or." The second of these sentences relating to the carriage of persons in common carriage operations solely between points *entirely within any state* (emphasis added) of the United States might possibly be applicable to some of the flights which Woolsey commanded, but that is not developed in the record. That leaves the first sentence of subparagraph (3) as the only portion of § 135.1(a) that might apply; and

here we meet again the definitional conundrum involved in this case. Assuming that the seating and payload capacities of the airplanes which Woolsey flew meet the limitations of the first sentence of subparagraph (3), the conundrum arises from the words "as a commercial operator (not an air carrier)" in this first sentence; and the definition which the Board uses to show that § 91.501 did not apply comes back to shoot the Board in the foot. The Board cannot have its cake and eat it too, and if the "holding out" by way of advertising and Yellow Pages listings caused Prestige's operations to be "common carriage" for purposes of 91.501, then Prestige cannot also be "a commercial operator (not an air carrier)" for purposes of subparagraph (3) of § 135.1(a).

In conclusion, I have to say that my gut reaction to this case is that the FAA decided to make a scape goat out of Woolsey because of the crash of the other aircraft carrying Reba McEntire's band. For the reasons set forth herein, I am unable to concur with my distinguished colleagues. I would reverse and remand for rehearing.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-4904

ROGER E. WOOLSEY,
Petitioner,

versus

NATIONAL TRANSPORTATION SAFETY BOARD
and FEDERAL AVIATION ADMINISTRATION,
Respondent.

Petition for Review of an Order of the
National Transportation Safety Board and
Federal Aviation Administration

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion June 23), 5 Cir., 1993_, ___ F.2d ___)

(August 18, 1993)

Before GOLDBERG, JONES and DEMOSS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR
THE COURT:

/s/ Irvin L. Goldberg
United States Circuit
Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX C

SERVED: September 9, 1991

NTSB Order No. EA-3391

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 28th day of August, 1991

JAMES B. BUSEY, Administrator, Federal Aviation Administration, Complainant, v. ROGER E. WOOLSEY, Respondent.	Docket No. SE-11979

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge Jimmy N. Coffman issued in this proceeding on July 24, 1991, at the conclusion of an evidentiary hearing.[1] By that decision the law judge affirmed the Administrator's emergency order, dated July 5, 1991, revoking respondent's commercial pilot certificate on allegations that he had violated section

[1] An excerpt from the hearing transcript containing the initial decision is attached.

91.13(a) of the Federal Aviation Regulations ("FAR," 14 C.F.R. section 91.13(a)),[2] by serving as pilot in command on 53 flights, for compensation or hire, without meeting the training and examination requirements of FAR Part 135[3], and by intentionally stopping an engine during flight to avoid delay for a fuel stop on an approach to land at Burbank, California, on November 29, 1990.

Respondent raises three issues on appeal.[4] While admitting that he served as pilot in command of the flights[5], he denies the allegation that they were governed by FAR Part 135, asserting that the flights fall under an exception to Part 135 contained in FAR section 91.501.[6]

---

[2] FAR Section 91.13(a) provides:

"§ 91.13 *Careless or reckless operation.*

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[3] FAR §§ 135.293(a) and (b), 135.297(a), 135.299(a), and 135.343. *See* Appendix.

[4] The Administrator has filed a brief in reply.

[5] There were 25 flights on Civil Aircraft N93SC, a Jet Commander Model IA-1121, occurring between May 1, 1990 and May 28, 1990; 24 flights on Civil Aircraft N49RJ, a Sabreliner Model 40, occurring between October 21, 1990 and December 9, 1990; and 4 flights on Civil Aircraft N49RJ occurring between March 14, 1991 and March 16, 1991

[6] FAR section 91.501 provides in pertinent part:

"§ 91.501 *Applicability.*

(a) This subpart prescribes operating rules, in addition to those prescribed in other subparts of this part, governing the operation of large and of turbojet-powered multiengine civil airplanes of U.S. registry. The operating rules in this subpart do not apply to those airplanes when they are required to be operated under parts 121, 125, 129, 135, and 137 of this chapter. . . .

Respondent also claims that the law judge committed prejudicial error by admitting Administrator's exhibits A-9 through A-15. As to the November 29, 1990 flight, respondent argues that the law judge erred in his credibility determination in favor of the Administrator's witness. As we find, for the reasons discussed below, no

---

(b) Operations that may be conducted under the rules in this subpart instead of those in parts 121, 129, 135, and 137 of this chapter when common carriage is not involved, include . . .

(6) The carriage of company officials, employees, and guests of the company on an airplane operated under a time sharing, interchange, or joint ownership agreement as defined in paragraph (c) of this section . . .

(c) As used in this section –

(1) A "time sharing agreement" means an arrangement whereby a person leases his airplane with flight crew to another person, and no charge is made for the flights conducted under this arrangement other than those specified in paragraph (d) of this section . . .

(d) The following may be charged, as expenses of a specific flight, for transportation as authorized by paragraphs (b)(3) and (7) and (c)(1) of this section:

(1) Fuel, oil, lubricants, and other additives.

(2) Travel expenses of the crew, including food, lodging, and ground transportation.

(3) Hangar and tie-down costs away from the aircraft's base of operation.

(4) Insurance obtained for the specific flight.

(5) Landing fees, airport taxes, and similar assessments.

(6) Customs, foreign permit, and similar fees directly related to the flight.

(7) In flight food and beverages.

(8) Passenger ground transportation.

(9) Flight planning and weather contract services.

(10) An additional charge equal to 100 percent of the expenses listed in paragraph (d)(1) of this section."

merit in respondent's objections to the law judge's decision as to the Part 135 allegations, the appeal will be denied, except to the extent that we will not affirm the allegation concerning the November 29, 1990 flight.

The evidence of record establishes that respondent, the owner of Prestige Touring, Inc. ("Prestige"), a Part 125 operator, had carved out a niche in the air transport industry by carrying rock and roll groups on aircraft when they were on tour throughout the United States. In 1989 respondent recognized that there was still an untapped market to be targeted, i.e., country and western entertainers, who largely travelled on tour by bus. Respondent does not deny that he tried to capture this market by mailing and faxing Prestige Touring, Inc. brochures and letters to these stars, soliciting their business. Narvel Blackstock, the husband and manager of Reba McEntire, testified by deposition that he was very impressed with Prestige's materials, which appeared on his desk just at the time when he and Reba McEntire were considering the use of an aircraft to finish up her 1989 tour, before the birth of their son. They subsequently contracted with Prestige for air transportation for the 1990 and 1991 tours as well.

In addition to Mr. Blackstock's testimony that his business was solicited by Prestige, and respondent's admission that Prestige solicited this business, the Administrator produced other evidence of Prestige's marketing efforts. The Administrator's exhibits include press kits which Prestige sent to more than one potential client, an ad which Prestige placed in a music-industry magazine, a promotional article carried in a music-industry

magazine, and a Yellow Pages listing for the company under "Aircraft Charter, Rental, & Leasing Service."[7]

Respondent claims that Prestige leased the subject aircraft under "time sharing agreements." He cites the fact that the aircraft were normally used only by that entertainer or his/her employees during the term of the lease. For example, Reba McEntire used a Sabreliner Model 40 in 1991. Her name was placed on the side of the aircraft and the logo "Shelby's Express" was placed underneath the pilot's window, because she apparently used the aircraft after each performance to get home to her son, Shelby. The star's personal belongings remained on the aircraft throughout the term of the lease. Coincidentally, the aircraft's registration number was N49RJ, and, according to respondent, even air traffic referred to the aircraft as "49 Reba Jet."[8] Further, respondent testified that he hangared N49RJ near the entertainer's home during the term of the lease, and housed his pilots in a corporate apartment nearby her home so that the aircraft would be available for her use at all times. Respondent also claims that Prestige's charges for leasing the aircraft were only those allowable under FAR section 91.501.

---

[7] Respondent claims that he neither asked for or paid for this Yellow Pages listing, and that when he was questioned about it by an FAA Inspector, that he was led to believe the ad would be condoned by the Administrator.

[8] There is evidence that "49 Reba Jet" was once used to transport The Judds during the lease with Reba McEntire, but with her permission since she was on vacation.

The law judge found that, notwithstanding respondent's claims that he strived to conform to the requirements of Section 91.501, the overwhelming evidence established that these operations were governed by Part 135 because Prestige Touring, Inc. failed to meet the threshold requirement of not being "common carriage." We agree. The four elements of common carriage are: (1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation. Para. 4, FAA Advisory Circular No. 120-12A, Respondent's Exhibit R-9. As the law judge found in the instant case, there was a "direct, open, obvious solicitation of business for an on-demand air charter," *i.e.*, a "holding out." Because of this "holding out," Prestige's operations were "common carriage."[9]

Respondent asserts that the law judge erred in considering the Administrator's evidence concerning Prestige's marketing efforts, as it denied him the right to cross-examine and confront witnesses against him. We find this contention to be without merit. The documents[10] were relevant and probative evidence of respondent's "holding out, gathered by an FAA Inspector directly from persons solicited by Prestige, during the course of his investigation, and identified as such by that Inspector,

---

[9] It is this "holding out" which clearly distinguishes the facts in this case from those found in *Administrator v. Bowen*, NTSB Order No. EA-3351 (served July 11, 1991), relied on by respondent in his appeal brief.

[10] Respondent's attack on the authenticity of the periodicals introduced by the Administrator is frivolous. Even under the Federal Rules, which are not controlling here, such documents would be considered self-authenticating. FRE 902(6).

who testified on behalf of the Administrator. This evidence met the requirements of the Administrative Procedure Act.[11]

Respondent further asserts that, notwithstanding this evidence of solicitation, Prestige's operations do not constitute common carriage because the solicitations were directed to the music industry, and there was no "holding out" to the general public. We disagree. FAA Advisory Circular No. 120-12A, which was offered into evidence by respondent,[12] indicates, in part, that

d. Carriage for hire which does not involve "holding out" is private carriage. . . .

e. A carrier holding itself out as generally willing to carry only certain kinds of traffic is, nevertheless, a common carrier.[13]

In summary, the Board concludes that Prestige's direct solicitation of the music industry as clients for air transportation constituted common carriage, precluding

---

[11] 5 USC §556(d) excludes only evidence which is irrelevant, immaterial, or unduly repetitious.

[12] Respondent admits that pursuant to his conversation with an FAA inspector prompted by the Yellow Pages listing, he was referred to FAA Advisory Circular No. 120-12A, Respondent's Exhibit R-9, for the definition of "common carriage."

[13] In addition, we note that the promotional article indicates that a Prestige jet was "chartered" to fly persons other than entertainers, including the article writer, to a club in Mexico owned by the rock group Van Halen, and a Prestige press release indicates that former Presidents Ford and Carter have been passengers on Prestige jets.

Prestige's claim that its operations fell within an exception to Part 135 contained in section 91.501. We adopt the law judge's findings that Prestige Touring, Inc.'s operations, as alleged in the Administrator's order, were governed by Part 135 and that respondent's operation of the aircraft as pilot in command resulted in violations of the allegations of the FAR as alleged, including section 91.13(a).

Finally, we will not affirm that portion of the section 91.13(a) allegation concerning the November 29, 1990 operation. Our review of the conflicting testimony of respondent and his co-pilot leads us to place great weight on the unrebutted expert testimony of respondent's witness, who opined that it was unlikely that this particular type of aircraft could suffer an engine stoppage due to fuel unporting, and respondent's claim that if there had been actual fuel exhaustion he would not have been able to restart the engines and land and taxi with both engines running, which his co-pilot admits did happen. As a result, we need not rule on the law judge's credibility determination in light of the untimely documentary evidence offered by respondent in his appeal. We nonetheless conclude that the sanction of revocation is clearly appropriate where, as here, respondent operated as pilot in command of 53 flights with paying passengers, to whom he owed a high standard of care, and when he did not have the necessary training, examinations and check rides required of him under Part 135.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal as to the allegation that his operation on November 29, 1990 constituted a violation

of FAR section 91.13(a) is granted; in all other respects, respondent's appeal is denied.

2. The initial decision, except as to the allegation regarding the November 29, 1990 operation is affirmed, and

3. The emergency order of revocation is affirmed.

KOLSTAD, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

APPENDIX

"§135.293 Initial and recurrent pilot testing requirements.

(a) No certificate holder may use a pilot, nor may any person serve as a pilot, unless, since the beginning of the 12th calendar month before that service, that pilot has passed a written or oral test, given by the Administrator or an authorized check pilot, on that pilot's knowledge in the following areas –

(1) The appropriate provisions of parts 61, 91, and 135 of this chapter and the operations specifications and the manual of the certificate holder.

(2) For each type of aircraft to be flown by the pilot, the aircraft powerplant, major components and systems, major appliances, performance and operating limitations, standard and emergency operating procedures, and the

contents of the approved Aircraft Flight Manual or equivalent, as applicable;

(3) For each type of aircraft to be flown by the pilot, the method of determining compliance with weight and balance limitations for takeoff, landing and en route operations;

(4) Navigation and use of air navigation aids appropriate to the operation or pilot authorization, including, when applicable, instrument approach facilities and procedures;

(5) Air traffic control procedures, including IFR procedures when applicable;

(6) Meteorology in general, including the principals of frontal systems, icing, fog, thunderstorms, and windshear, and, if appropriate for the operation of the certificate holder, high altitude weather;

(7) Procedures for –

(i) Recognizing and avoiding severe weather situations;

(ii) Escaping from severe weather situations, in cases of inadvertent encounters, including low-altitude windshear (except that rotorcraft pilots are not required to be tested on escaping from low-altitude windshear); and

(iii) Operating in or near thunderstorms (including clear air turbulence), icing, hail, and other potentially hazardous meteorological conditions; and

(8) New equipment, procedures, or techniques, as appropriate.

(b) No certificate holder may use a pilot, nor may any person serve as a pilot, in any aircraft unless, since the beginning of the 12th calendar month before that service, that pilot has passed a competency check given by the Administrator or an authorized check pilot in that class of aircraft, if single-engine airplane other than turbojet, or that type of aircraft, if helicopter, multiengine airplane, or turbojet airplane, to determine the pilot's practical skills and techniques in that aircraft or class of aircraft. The extent of the competency check shall be determined by the Administrator or authorized check pilot conducting the competency check. The competency check may include any of the maneuvers and procedures currently required for the original issuance of the particular pilot certificate required for the operations authorized and appropriate to the category, class and type of aircraft involved. For the purposes of this paragraph, type, as to an airplane, means any one of a group of airplanes determined by the Administrator to have a similar means of propulsion, the same manufacturer, and no significantly different handling or flight characteristics. For the purposes of this paragraph, type, as to a helicopter, means a basic make and model.

§135.297 Pilot in command: Instrument proficiency check requirements.

(a) No certificate holder may use a pilot, nor may any person serve, as a pilot in command of an aircraft under IFR unless, since the beginning of the 6th calendar month before that service, that pilot has passed an instrument proficiency check under this section administered by the Administrator or an authorized check pilot.

§ 135.299 Pilot in command: Line checks: Routes and airports.

(a) No certificate holder may use a pilot, nor may any person serve, as pilot in command of a flight unless, since the beginning of the 12th calendar month before that service, that pilot has passed a flight check in one of the types of aircraft which that pilot is to fly. The flight check shall –

(1) Be given by an approved check pilot or by the Administrator.

(2) Consist of at least one flight over one route segment; and

(3) Include takeoffs and landings at one or more representative airports. In addition to the requirements of this paragraph, for a pilot authorized to conduct IFR operations, at least one flight shall be flown over a civil airway, an approved off-airway route, or a portion of either of them.

§ 135.343 Crewmember initial and recurrent training requirements.

No certificate holder may use a person, nor may any person serve, as a crewmember in operations under this part unless that crewmember has completed the appropriate initial or recurrent training phase of the training program appropriate to the type of operation in which the crewmember is to serve since the beginning of the 12th calendar month before that service. This section does not apply to a certificate holder that uses only one pilot in the certificate holder's operations."

APPENDIX D

BEFORE THE

NATIONAL TRANSPORTATION SAFETY BOARD

In the Matter of:	)	Docket No. SE-11979
JAMES E. BUSEY, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION,	)	
Complainant,	)	
vs.	)	
ROGER E. WOOLSEY,	)	
Respondent.	)	

ORAL INITIAL DECISION AND ORDER

JUDGE COFFMAN: We have heard the case of the Administrator, Mr. Busey, versus the Respondent, Mr. Woolsey. The case is SE-11979.

The case was conducted today, the 24th day of July, 1991 in Arlington, Texas. The Administrator, at all times, has been represented by Assistant Chief Counsel from the FAA Southwest Region, Mr. Tim Duff. The Respondent has been present in the courtroom at all times with his attorney, Mr. Scott Hamilton from Broomfield, Colorado.

The trial was conducted through the day. We have had witnesses and exhibits introduced on both sides.

And just a little discussion here. Many of the flights were admitted to, so we don't have to discuss each [p. 205] and every flight that was taken.

I would state for the record several things. The fact that the case that Mr. Hamilton pointed out – and this is the Stancil case, the Supreme Court of North Carolina, 1960. I think the facts are a little different in that case.

It was a trip involving two business partners that were flying a Valonca [phonetic], and the trip was for business purposes. And I think the facts of that case are a little different.

However, in Administrator's – I am sorry – in respondent's Exhibit R-9 it states very clearly that in the guidelines in this FAA advisory circular number AC120-12A that there is four elements in defining a common carrier:

A holding out of a willingness, number one; to transport persons or property is number; number three, from place to place;; and number four, for compensation.

This case against Mr. Woolsey – this emergency order revocation really involves two things. Number one, it involves, where the flights that were admitted to and the flights were made by Mr. Woolsey – whether they were under 91.501 or whether they were under 135. That is the first issue.

The second issue was whether the flight on [p. 206] November 29, 1990 from Gallaton, Tennessee to Burbank, California was careless and reckless.

Let's talk about the 91 versus the 501 flights. The AC addresses the issue of common carriers versus private carriers. It talks about holding itself out.

And in that regards, would like to call the record's attention to Mr. Blackstock's deposition, which Mr. Blackstock, for the record, is the business manager of Reba McEntire.

He states in his depositions on page 6 and 7 that due to her pregnancy, that she was very uncomfortable on a bus, and they wanted to check on flying.

And he says at line three, "We picked up the yellow pages and called some local charters and the only planes that we found were available was a Lear 24 that was out in Smerna [phonetic]."

And he describes how they went to look at the plane and didn't like the looks of it.

Down at line 20 – this is on page 6 of Mr. Blackstock's deposition – he says, "The next morning I came in and I had received either a letter or a flyer. I can't really remember what the first contact was, if it was a letter or a brochure from Prestige, but I had on my desk a letter from Prestige Touring.

"It stated" – and continuing on page 7 – [p. 207] that they had flown many of the pop artists, Billy Joel, Stevie Nicks, U2. I was very impressed. I thought, Well I will give them a call and run this itinerary by them and see what happens."

I think that as to the holding out issue, that a business such as Mr. Woolsey holds – and we have Administrator's 12 and Administrator's 13. I think it is very clear – I think it is abundantly clear that Prestige Touring was holding itself out to the music industry as being available for and operating a charter business.

You just don't send out press guides. You don't send out press packets. You don't advertise. You don't list yourself in the yellow pages.

You don't do things such as put together a touring package and send it to people attempting to solicit business, which apparently this contact with Mr. Blackstock was unsolicited.

It was – he had a letter – he had a brochure from Mr. Woolsey telling him about his company, or from somebody at Prestige Touring, Inc. telling them about his company. And it just appears abundantly clear that that was a direct solicitation of business.

I want to cite for the record – I know you gentlemen – you counselors probably don't have the benefit of it, since it is a most recent case. It was a [p. 208] case that I heard involving Mr. Dan Bowen, Board Order Number EA 3351.

It was a case that I tried in Virginia Beach the first week of June of last month. The Board decision date is July 11, 1991.

In this case, it was facts very similar to what type of company – we had a company run by Mr. Bowen that the FAA alleged that he was operating flights under 135, and Mr. Bowen maintained that he was operating flights under part 91.

In that case, I dismissed the FAA's order of revocation against Mr. Bowen and determined that the flights were part 91 flights. That order was affirmed by the full Board on July 11, 1991.

However, my opinion in this case, looking at the circumstances of the two cases, that Mr. Woolsey's does

not fit into the category of the flights as described in the Bowen case.

Part 91.501 is a gray area and is difficult to understand, but not impossible. However, in this case – In Mr. Woolsey's case, we do not have the intricate agreements like we had in the Bowen case.

We do not have the time share agreements. We don't have the lease back agreements. We don't have the specific agreements – the demonstration flight agreements [p. 209] or other documentation that would show that these flights were done under 91.501 and not under 135.

Plus, additionally, in this case, Mr. Woolsey's case, in my opinion, the evidence will support a finding that there was direct, open, obvious solicitation of business for an on-demand air charter.

Now, when we get into credibility, you have to look at – when we are looking at the credibility of Mr. Woolsey and the credibility of Mr. Dalton as to the incident alleged to have occurred on November 29 – you have to look at several factors in determining what each witness would have to gain by the outcome. That is one of the factors.

You have to look at any prejudices that either witness might have towards the testimony that they are about to give.

You have to look at the reason for their testimony. You have to look at the demeanor and the appearance.

And I submit for the record that there is no reason that became apparent to this Court today why Mr. Dalton would come into this Court and perjure himself.

On the other hand, Mr. Woolsey has everything to gain and everything to lose in this case – his commercial pilot's license is at stake. His reputation in [p. 210] the music industry, in the entertainment business is at stake in this case.

So I think in all due respect to the imminent experts on the Sabre, Mr. Lowery – I respect Mr. Lowery, however, I submit that I don't see any reason why Mr. Dalton would make up something like shutting an engine down, restarting it and then running out of gas on an approach into Burbank.

It sounds like that there was a lot of pressure on Mr. Woolsey to get – and I am sure that Mr. Blackstock and Reba McEntire would have been very unhappy had they had to land in Las Vegas or Phoenix.

But I think with the experiences that they have recently undergone, I think they would have been much happier to land in Phoenix and Las Vegas and refuel then to cut it as close as they did.

And it sounds to me like they cut it real close, because Mr. Woolsey, I think, testified that he logged 4.5 or 4.6 on that flight.

Well, that is 4:30 to 4:45, 4:50, somewhere – that is just awful, awful close on fuel consumption, fuel starvation. And how many flights do we all see reading the NTSB reports and accidents. Every day we see fuel starvation, fuel starvation as a cause of accidents, day after day.

[p. 211] So I am going to accept Mr. Dalton's testimony that it did happen. For whatever reason, the engine was shut down.

And I am not going to reread the entire order in its entirety due to its length, but I will say that this Court will adopt the emergency order of revocation as amended.

It will be the order of this Court that this order will be affirmed and Mr. Woolsey's airman certification number 432194443 with commercial pilot privileges is revoked, revocation to become effective immediately.

/s/ _____
Jimmy N. Coffman
Administrative Law Judge

[p. 212] APPEAL

I must add for the record, gentlemen, that any party to this proceeding may appeal this proceeding by filing with the Board – and both of you attorneys are very experienced, but I want to caution you on the appeal time on an emergency.

Should you decide to appeal you must within two days from this date – I say again – within two days from this date, you must file with the Board a notice of intent to appeal.

That appeal has to be perfected within five days after that date by filing with the Board a brief in support of such appeal.

Let me caution both of you – and you read the opinions as well as I do – that the Board will not hesitate

to dismiss a case – dismiss an appeal for failure to file a timely brief or timely notice.

Any questions, Mr. Duff, on behalf of the Administrator?

MR. DUFF: None from the Administrator, Your Honor.

JUDGE COFFMAN: Mr. Hamilton, sir, any questions on behalf of the Respondent?

MR. HAMILTON: No, Your Honor.

JUDGE COFFMAN: Thank you, sir. We are [p. 213] adjourned.

(Whereupon, at 4:45 p.m. this hearing was concluded.)

[p. 214] CERTIFICATE

CASE NAME: Roger E. Woolsey

DOCKET NUMBER: SE-11979

LOCATION: Arlington, Texas

DATE: July 24, 1991

I do hereby certify that the foregoing pages, numbers 1 through 214, inclusive, are the true, accurate, and complete transcript prepared from the verbal recording made

by electronic recording by Barbara Wall before the National Transportation Safety Board.

/s/ Laura A. Schneider 07-26-91
(Transcriber) (Date)

/s/ Betsy Phillips 07/26/91
(Transcriber) (Date)

On the Record Reporting, Inc.
5926 Balcones Dr., Suite 115
Austin, Texas 78731

APPENDIX E

Advisory Circular

U.S. Department
of Transportation

**Federal Aviation
Administration**

Subject:	PRIVATE CARRIAGE VERSUS COMMON CARRIAGE OF PERSONS OR PROPERTY
Date:	4/24/86
Initiated by:	AFS-820
AC No:	120-12A
Change:	

---

1. *PURPOSE.* This advisory circular furnishes Federal Aviation Administration (FAA) personnel and interested segments of industry with general guidelines for determining whether current or proposed transportation operations by air constitute private or common carriage. If the operations are in interstate or foreign commerce, this distinction determines whether or not the operator needs economic authority as an "air carrier" from the Department of Transportation. Operations that constitute common carriage are required to be conducted under Federal Aviation Regulations (FAR) Parts 121 or 135. Private carriage may be conducted under Far Part 125 or 91, Subpart D. Operations conducted under FAR Section 91.181, which permits certain charges to be made, may also be

subject to these guidelines, particularly the "time sharing" provisions of FAR Section 91.181(c)(1). It should also be noted that lease agreements entered into under FAR Section 91.181 are subject to FAR Section 91.54, "Truth in leasing clause requirement in leases and conditional sales contracts."

2. *CANCELLATION.* Advisory Circular 120-12, Private Carriage versus Common Carriage By Commercial Operators Using Large Aircraft, dated June 24, 1964, is canceled.

3. *BACKGROUND.* "Common carriage" and "private carriage" are common law terms. The Federal Aviation Act of 1958 uses the term "common carriage" but does not define it. It has therefore been determined that guidelines giving general explanations of the term "common carriage" and its opposite, "private carriage," would be helpful.

4. *GUIDELINES.* A carrier becomes a common carrier when it "holds itself out" to the public, or to a segment of the public, as willing to furnish transportation within the limits of its facilities to any person who wants it. Absence of tariffs or rate schedules, transportation only pursuant to separately negotiated contracts, or occasional refusals to transport, are not conclusive proof that the carrier is not a common carrier. There are four elements in defining a common carrier; (1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation. This "holding out" which makes a person a common carrier can be done in many ways and it does not matter how it is done.

a. Signs and advertising are the most direct means of "holding out" but are not the only ones.

b. A "holding out" may be accomplished through the actions of agents, agencies, or salesmen who may, themselves, procure passenger traffic from the general public and collect them into groups to be carried by the operator. It is particularly important to determine if such agents or salesmen are in the business of selling transportation to the traveling public not only through the "group" approach but also by individual ticketing on known common carriers.

c. Physically holding out without advertising where a reputation to serve all is gained is sufficient to constitute an offer to carry all customers. There are many means by which physical holding out may take place. For example, the expression of willingness to all customers with whom contact is made that the operator can and will perform the requested service is sufficient. The fact that the holding out generates little success is of no consequence. The nature and character of the operation are the important issue.

d. Carriage for hire which does not involve "holding out" is private carriage. Private carriers for hire are sometimes called "contract carriers," but the term is borrowed from the Interstate Commerce Act and legally inaccurate when used in connection with the Federal Aviation Act. Private carriage for hire is carriage for one or several selected customers, generally on a long-term basis. The number of contracts must not be too great, otherwise it implies a willingness to make a contract with

anybody. A carrier operating pursuant to 18 to 24 contracts has been held to be a common carrier because it held itself out to serve the public generally to the extent of its facilities. Private carriage has been found in cases where three contracts have been the sole basis of the operator's business. Special adaptation of the transportation service to the individual needs of shippers is a factor tending to establish private carriage but is not necessarily conclusive.

e. A carrier holding itself out as generally willing to carry only certain kinds of traffic is, nevertheless, a common carrier. For instance, a carrier authorized or willing only to carry planeloads of passengers, cargo, or mail on a charter basis is a common carrier, if it so holds itself out. This is, in fact, the basic business of supplemental air carriers.

f. A carrier flying charters for only one organization may be a common carrier if membership in the organization and participation in the flights are, in effect, open to a significant segment of the public. Similarly, a carrier which flies planeload charters for a common carrier, carrying the latter's traffic, engages in common carriage itself.

g. Occasionally, offers of free transportation have been made to the general public by hotels, casinos, etc. In such cases, nominal charges have been made which, according to the operators, bear the expense of gifts and gratuities. However, the operators maintain that the transportation is free. The courts have held that such operations are common carriage based on the fact that the

passengers are drawn from the general public and the nominal charge constituted compensation.

h. Persons admittedly operating as common carriers in a certain field (for instance, in intrastate commerce) sometimes claim that transportation for hire which they perform in other fields (for instance, interstate or foreign commerce) is private carriage. To sustain such a claim, the carrier must show that the private carriage is clearly distinguishable from its common carriage business and outside the scope of its holding out. The claimed private carriage must be viewed in relation to and against the background of the entire carrying activity. Historically, Civil Aeronautics Board decisions have concluded that only in rare instances could carriage engaged in by a common carrier be legitimately classified as private.

i. In summary, persons intending to conduct only private operations in support of other business should look cautiously at any proposal for revenue-generating flights which most likely would require certification as an air carrier.

j. Persons who have questions concerning intended operation of their aircraft are encouraged to discuss their proposed operation with the Regional Counsel of the FAA region in which it intends to establish its principal business office. Such early interviews will materially assist the applicant in avoiding many of the "pitfalls" which could result in illegal common carriage operations.

/s/ William T. Brennan
William T. Brennan
Acting Director of Flight Standards

APPENDIX F

5 U.S.C § 553

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved –

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include –

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply –

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that

notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, section 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except –

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

49 U.S.C.App. § 1301 FEDERAL AVIATION PROGRAM

49 U.S.C.App. §§ 1301 (3), (10), (24).

SUBCHAPTER I – GENERAL PROVISIONS

§ 1301. Definitions

As used in this chapter, unless the context otherwise requires –

* * *

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided,* That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest.

* * *

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

* * *

(24) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively –

> (a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;
>
> (b) a place in any State of the United States, or the District of Columbia and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and
>
> (c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

* * *

14 C.F.R. § 91.501.

§ 91.501 Applicability.

(a) This subpart prescribes operating rules, in addition to those prescribed in other subparts of this part, governing the operation of large and of turbojet-powered multiengine civil airplanes of U.S. registry. The operating rules in this subpart do not apply to those airplanes when they are required to be operated under parts 121, 125, 129, 135, and 137 of this chapter. (Section 91.409 prescribes an inspection program for large and for turbine-powered (turbojet and turboprop) multiengine airplanes

of U.S. registry when they are operated under this part or part 129 or 137.)

(b) Operations that may be conducted under the rules in this subpart instead of those in parts 121, 129, 135, and 137 of this chapter when common carriage is not involved, include –

(1) Ferry or training flights;

(2) Aerial work operations such as aerial photography or survey, or pipeline patrol, but not including fire fighting operations;

(3) Flights for the demonstration of an airplane to prospective customers when no charge is made except for those specified in paragraph (d) of this section;

(4) Flights conducted by the operator of an airplane for his personal transportation, or the transportation of his guests when no charge, assessment, or fee is made for the transportation;

(5) Carriage of officials, employees, guests, and property of a company on an airplane operated by that company, or the parent or a subsidiary of the company or a subsidiary of the parent, when the carriage is within the scope of, and incidental to, the business of the company (other than transportation by air) and no charge, assessment or fee is made for the carriage in excess of the cost of owning, operating, and maintaining the airplane, except that no charge of any kind may be made for the carriage of a guest of a company, when the carriage is not within the scope of, and incidental to, the business of that company;

(6) The carriage of company officials, employees, and guests of the company on an airplane operated under a time sharing, interchange, or joint ownership agreement as defined in paragraph (c) of this section;

(7) The carriage of property (other than mail) on an airplane operated by a person in the furtherance of a business or employment (other than transportation by air) when the carriage is within the scope of, and incidental to, that business or employment and no charge, assessment, or fee is made for the carriage other than those specified in paragraph (d) of this section;

(8) The carriage on an airplane of an athletic team, sports group, choral group, or similar group having a common purpose or objective when there is no charge, assessment, or fee of any kind made by any person for that carriage; and

(9) The carriage of persons on an airplane operated by a person in the furtherance of a business other than transportation by air for the purpose of selling them land, goods, or property, including franchises or distributorships, when the carriage is within the scope of, and incidental to, that business and no charge, assessment, or fee is made for that carriage.

(c) As used in this section –

(1) A *time sharing agreement* means an arrangement whereby a person leases his airplane with flight crew to another person, and no charge is made for the flights conducted under that arrangement other than those specified in paragraph (d) of this section;

(2) An *interchange agreement* means an arrangement whereby a person leases his airplane to another person in exchange for equal time, when needed, on the other person's airplane, and no charge, assessment, or fee is made, except that a charge may be made not to exceed the difference between the cost of owning, operating, and maintaining the two airplanes;

(3) A *joint ownership agreement* means an arrangement whereby one of the registered joint owners of an airplane employs and furnishes the flight crew for that airplane and each of the registered joint owners pays a share of the charge specified in the agreement.

(d) The following may be charged, as expenses of a specific flight, for transportation as authorized by paragraphs (b) (3) and (7) and (c)(1) of this section:

(1) Fuel, oil, lubricants, and other additives.

(2) Travel expenses of the crew, including food, lodging, and ground transportation.

(3) Hangar and tie-down costs away from the aircraft's base of operation.

(4) Insurance obtained for the specific flight.

(5) Landing fees, airport taxes, and similar assessments.

(6) Customs, foreign permit, and similar fees directly related to the flight.

(7) In flight food and beverages.

(8) Passenger ground transportation.

(9) Flight planning and weather contract services.

(10) An additional charge equal to 100 percent of the expenses listed in paragraph (d)(1) of this section.

14 C.F.R. § 121.1

§ 121.1 Applicability.

(a) Except as prescribed in paragraph (b) of this section, this part prescribes rules governing the certification and operations of the following:

(1) Each air carrier engaging in interstate or overseas air transportation under a certificate of public convenience and necessity or other appropriate economic authority issued by the CAB.

(2) Each air carrier engaging in foreign air transportation under a certificate of public convenience and necessity or other appropriate economic authority issued by the CAB.

(3) Each air carrier covered by paragraph (a) (1) or (2) of this section when engaging in charter flights or other special service operations.

(4) Each supplemental air carrier when it engages in the carriage of persons or property in air commerce for compensation or hire.

(5) Each commercial operator when it engages in the carriage of persons or property in air commerce for compensation or hire –

(i) With large aircraft other than airplanes; or

(ii) As a common carrier solely between places entirely within any state of the United States, with airplanes having a seating capacity of more than 30 passengers or a maximum payload capacity of more than 7,500 pounds.

(6) Each air carrier when it engages in all-cargo air service under a certificate issued by the CAB under section 418 of the Federal Aviation Act of 1958.

(b) This part does not apply to operations conducted under part 127, 133, or 135 of this chapter, or emergency mail service conducted under section 405(h) of the Federal Aviation act of 1958.

(c) In addition, this part prescribes rules governing –

(1) Each person employed or used by an air carrier or commercial operator in operations under this part, including the maintenance, preventive maintenance and alteration of aircraft; and

(2) Each person who applies for provisional approval of an Advanced Qualification Program curriculum, curriculum segment, or portion of a curriculum segment under SFAR No. 58 and each person employed or used by an air carrier or commercial operator under this part to perform training, qualification, or evaluation functions under an Advanced Qualification Program under SFAR No. 58; and

(3) Each person who is on board an aircraft being operated under this part.

(d) For the purpose of this part, *passenger-carrying airplane* or *passenger-carrying operation* means one carrying any person other than a person listed in § 121.583

(e) For the purpose of this part, *passenger-carrying aircraft* or *passenger-carrying operation* means one carrying any person other than a flight crewmember or other crewmember, company employee, authorized government representative, or person accompanying a shipment.

(f) This part does not apply to operations conducted under § 91.321.

14 C.F.R. § 125.1

§ 125.1 Applicability.

(a) Except as provided in paragraphs (b) and (c) of this section, this part prescribes rules governing the operations of U.S.-registered civil airplanes which have a seating configuration of 20 or more passengers, or a maximum payload capacity of 6,000 pounds or more when common carriage is not involved.

(b) The rules of this part do not apply to the operations of airplanes specified in paragraph (a) of this section, when –

(1) They are required to be operated under part 121, 129, 135, or 137 of this chapter;

(2) They have been issued restricted, limited, or provisional airworthiness certificates, special flight permits, or experimental certificates;

(3) They are being operated by a part 125 certificate holder without carrying passengers or cargo under part 91 for training, ferrying, positioning, or maintenance purposes;

(4) They are being operated under part 91 by an operator certificated to operate those airplanes under part 121, 135, or 137 of this chapter or are being operated by a foreign air carrier or a foreign person in common carriage solely outside the United States under part 91 of this chapter; or

(5) They are being operated under a deviation authority issued under § 125.3 of this chapter.

(c) The rules of this part, except § 125.247, do not apply to the operation of airplanes specified in paragraph (a) when they are operated outside the United States by a person who is not a citizen of the United States.

14 C.F.R. § 129.1

§ 129.1 Applicability.

(a) Except as provided in paragraph (b) of this section, this part prescribes rules governing the operation within the United States of each foreign air carrier holding a permit issued by the Civil Aeronautics Board or the Department of Transportation under section 402 of the Federal Aviation Act of 1958 (49 U.S.C. 1372) or other appropriate economic or exemption authority issued by the Civil Aeronautics Board or the Department of Transportation.

(b) Section 129.14 also applies to U.S.-registered aircraft operated in common carriage by a foreign person or foreign air carrier solely outside the United States. For the purpose of this part, a foreign person is any person, not a citizen for the United States, who operates a U.S.-registered aircraft in common carriage solely outside the United States.

14 C.F.R. § 135.1

§ 135.1 Applicability.

(a) Except as provided in paragraph (b) of this section, this part prescribes rules governing –

(1) Air taxi operations conducted under the exemption authority of part 298 of this title;

(2) The transportation of mail by aircraft conducted under a postal service contract awarded under section 5402c of title 39, U.S.C.;

(3) The carriage in air commerce of persons or property for compensation or hire as a commercial operator (not an air carrier) in aircraft having a maximum seating capacity of less than 20 passengers or a maximum payload capacity of less than 6,000 pounds, or the carriage in air commerce of persons or property in common carriage operations solely between points entirely within any state of the United States in aircraft having a maximum seating capacity of 30 seats or less or a maximum payload capacity of 7,500 pounds or less; and

(4) Each person who applies for provisional approval of an Advanced Qualification Program curriculum, curriculum segment, or portion of a curriculum segment under SFAR No. 58 and each person employed or used by an air carrier or commercial operator under this part to perform training, qualification, or evaluation functions under an Advanced Qualification Program under SFAR No. 58; and

(5) Each person who is on board an aircraft being operated under this part.

(b) Except as provided in paragraph (c) of this section, this part does not apply to –

(1) Student instruction;

(2) Nonstop sightseeing flights that begin and end at the same airport, and are conducted within a 25 statute mile radius of that airport;

(3) Ferry or training flights;

(4) Aerial work operations, including –

(i) Crop dusting, seeding, spraying, and bird chasing;

(ii) Banner towing;

(iii) Aerial photography or survey;

(iv) Fire fighting;

(v) Helicopter operations in construction or repair work (but not including transportation to and from the site of operations); and

(VI) Powerline or pipeline patrol, or similar types of patrol approved by the Administrator;

(5) Sightseeing flights conducted in hot air balloons;

(6) Nonstop flights conducted within a 25 statute mile radius of the airport of takeoff carrying persons for the purpose of intentional parachute jumps;

(7) Helicopter flights conducted within a 25 statute mile radius of the airport of takeoff, if –

(i) Not more than two passengers are carried in the helicopter in addition to the required flight crew;

(ii) Each flight is made under VFR during the day;

(iii) The helicopter used is certificated in the standard category and complies with the 100-hour inspection requirements of part 91 of this chapter.

(iv) The operator notifies the FAA Flight Standards District Office responsible for the geographic area concerned at least 72 hours before each flight and furnishes any essential information that the office requests;

(v) The number of flights does not exceed a total of six in any calendar year;

(vi) Each flight has been approved by the Administrator; and

(vii) Cargo is not carried in or on the helicopter;

(8) Operations conducted under part 133 or 375 of this title;

(9) Emergency mail service conducted under section 405(h) of the Federal Aviation Act of 1958; or

(10) This part does not apply to operations conducted under the provisions of § 91.321.

(c) For the purpose of §§ 135.249, 135.251, and 135.353 *operator* means any person or entity conducting nonstop sightseeing flights for compensation or hire in an airplane or rotorcraft that begin and end at the same airport and are conducted within a 25 statute mile radius of that airport.

(d) Notwithstanding the provisions of paragraph (c) of this section, an operator who does not hold a part 121 certificate or a part 135 certificate is permitted to use a

person, who is otherwise authorized to perform aircraft maintenance or preventive maintenance duties and who is not subject to the requirements of an FAA-approved anti-drug program, to perform –

(1) Aircraft maintenance or preventive maintenance on the operator's aircraft if the operator would be required to transport the aircraft more than 50 nautical miles further than the closest available repair point from the operator's principal place of operations to obtain these services; or

(2) Emergency repairs on the operator's aircraft if the aircraft cannot be safely operated to a location where an employee subject to the requirements of this appendix can perform the emergency repairs.

Supreme Court, U.S.
FILED
APR 25 1994
OFFICE OF THE CLERK

No. 93-1188

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROGER WOOLSEY, PETITIONER

v.

NATIONAL TRANSPORTATION SAFETY BOARD AND FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

ROBERT S. GREENSPAN
SANDRA WIEN SIMON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

13 pp

QUESTION PRESENTED

Whether the National Transportation Safety Board erred in finding that petitioner's company was conducting "common carriage" on the flights at issue.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

East Coast Flying Service, Enforcement Proceeding, 46 C.A.B. 640 (1967)	7
Home Insurance Co. v. *Riddell*, 252 F.2d 1 (5th Cir. 1958)	9
Jackson v. *Stancil*, 116 S.E.2d 817 (N.C. 1960)	9
Las Vegas Hacienda, Inc. v. *CAB*, 298 F.2d 430 (9th Cir.), cert. denied, 369 U.S. 885 (1962)	5, 7
Louisville & N.R.R. v. *United States*, 282 U.S. 740 (1931)	8-9
Martin v. *OSHRC*, 499 U.S. 144 (1991)	10
Semon v. *Royal Indemnity Co.*, 279 F.2d 737 (5th Cir. (1960)	9
Southeast Airlines, Enforcement Proceeding, 32 C.A.B. 1281 (1961)	8
Terminal Taxicab Co. v. *Kutz*, 241 U.S. 252 (1916)	9

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 553	9
Federal Aviation Act of 1958, 49 U.S.C. App. 1301 *et seq.*	4
Federal Aviation Regulations, 14 C.F.R.:	
Pt. 91	3, 5
Pt. 135	3, 6, 8

Miscellaneous:

FAA Advisory Circular No. 120-12A (Apr. 24, 1986)	3, 4, 6, 7, 9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1188

ROGER WOOLSEY, PETITIONER

v.

NATIONAL TRANSPORTATION SAFETY BOARD AND FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 993 F.2d 516. The orders of the National Transportation Safety Board (Pet. App. 35a-46a) and the Administrative Law Judge (Pet. App. 47a-55a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1993. A petition for rehearing was denied on August 18, 1993. Pet. App. 33a-34a. On October 20, 1993, Justice Scalia extended the time for filing a petition for a writ of certiorari to and including January 18, 1994. The petition for a writ of certiorari

was filed on January 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is president of Prestige Touring, Inc. (PTI), a small air carrier that specializes in transporting musicians. Pet. App. 2a. PTI marketed itself primarily to rock musicians and had at least twenty-five such contracts in 1990. There is no evidence that PTI ever turned away anyone in the music industry who applied to it for air transportation and was willing to pay its fee. *Id.* at 3a. In 1989, petitioner decided to seek business with the country music industry, and he sent Reba McEntire's manager information about PTI's services. *Ibid.*

Shortly thereafter, PTI negotiated an agreement with Reba's Business, Inc., pursuant to which PTI agreed to transport Ms. McEntire and her music group for a fee for a minimum number of hours of flight time per year. PTI also agreed to provide a specific aircraft for the exclusive use of Ms. McEntire and her group, and painted her name and her son's name on the plane. Ms. McEntire and her guests were permitted to leave personal belongings on the plane at all times. In addition, PTI agreed to make the flights from the airport in Gallatin, Tennessee, which was a convenient location for Ms. McEntire. PTI rented an apartment in Gallatin, Tennessee, so that a flight crew would be available on short notice. Pet. App. 4a-5a. Reba's Business, Inc., ceased doing business with PTI when an airplane for which Reba's Business had contracted crashed in March 1991. *Id.* at 5a.

2. On July 5, 1991, the Federal Aviation Administration (FAA) issued an emergency order alleging a number of regulatory violations in connection with PTI's service to Reba's Business and revoking petitioner's commercial pilot certification. Petitioner was alleged to have served as the pilot in command on fifty-three flights for compensation for Reba's Business without meeting the training and examination requirements for pilots operating aircraft for a common carrier under the Federal Aviation Regulations, 14 C.F.R. Pt. 135. Petitioner defended on the ground that the aircraft involved were not operated in "common carriage," and that, accordingly, the less stringent safety requirements of 14 C.F.R. Pt. 91, should have been applied by the National Transportation Safety Board (NTSB). Pet. App. 2a, 5a.

An administrative law judge (ALJ) orally affirmed the decision of the FAA Administrator. The NTSB affirmed the ALJ's decision with respect to the revocation of petitioner's license. The NTSB concluded that revocation of petitioner's license was appropriate "where, as here, respondent operated as pilot in command of 53 flights with paying passengers, to whom he owed a high standard of care, and when he did not have the necessary training, examinations and check rides required of him under [14 C.F.R.] Part 135 [which applies to common carriers]." Pet. App. 42a. In finding that PTI operated as a common carrier, the NTSB relied on the definition of that term provided in FAA Advisory Circular No. 120-12A (Apr. 24, 1986) (*reproduced at* Pet. App. 56a-60a). Pet. App. 41a-42a. That Advisory Circular provides that "[t]here are four elements in defining a common

carrier[:] (1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation. This 'holding out' which makes a person a common carrier can be done in many ways and it does not matter how it is done." *Id.* at 57a.

3. The court of appeals affirmed. Pet. App. 1a-32a. The court held that the NTSB correctly interpreted the term "common carrier" as applied to air carriers, and it accordingly rejected petitioner's claim that PTI was not subject to the safety requirements of 14 C.F.R. Pt. 135. Pet. App. 2a. The court noted that the term "common carrier" is not defined in the Federal Aviation Act or in the Federal Aviation Regulations, and noted that it must look to other sources, most notably the common law relating to air carriers, to determine whether PTI was a common carrier with respect to the flights in question. *Id.* at 14a-15a. The court relied for guidance on Advisory Circular No. 120-12A, finding that "the definition of common carrier provided therein is in relevant respect the same as that found at common law," and that the Advisory Circular "does not seek to broaden the definition of common carriage." Pet. App. 17a.

The court rejected petitioner's claim that PTI did not meet the common-law definition of "common carrier" because PTI allegedly furnished air transportation selectively and any "holding out" was no more than an invitation to negotiate contracts on a case-by-case basis. Pet. App. 15a-16a. The court explained that, consistent with the Advisory Circular, the "crucial determination in assessing the status of a carrier is whether the carrier has held itself out to the public or to a definable *segment* of the public as being willing to transport for hire, indiscriminately."

Id. at 18a (citing, *inter alia*, *Las Vegas Hacienda, Inc.* v. *CAB*, 298 F.2d 430 (9th Cir.), cert. denied, 369 U.S. 885 (1962)). Based on that definition, the court concluded that there was substantial evidence on which the ALJ and NTSB could conclude that PTI had held itself out as being willing to serve all members of the music industry who were able to pay for its services, and that "[o]n these facts alone, the NTSB was justified in concluding that PTI acted as a common carrier." Pet. App. 20a-21a.

The court also rejected petitioner's related claim that PTI is not a common carrier because PTI does not utilize uniform tariffs. The court agreed with the FAA that the absence of uniform tariffs does not alone suffice to make the carrier a private carrier, and noted that "[w]hat is crucial is that the common carrier defines itself through its own marketing efforts as being willing to carry any member of that segment of the public which it serves." Pet. App. 21a-22a. Thus, even if petitioner subjectively intended to bring his operations under the less restrictive provisions of 14 C.F.R. Pt. 91, it is "the objective conduct of himself and his corporation which bring their actions under [14 C.F.R.] Part 135." Pet. App. 24a.

Judge DeMoss dissented. In his view, the FAA's failure to define the term "common carriage" or "common carrier" through a formal rulemaking presents a "serious due process problem," because it can lead to the revocation of a pilot's license based on "an administrative agency's ad hoc definition of a critical term." Pet. App. 25a. Judge DeMoss also concluded that the meaning that the FAA gives to the term "common carriage" is inconsistent with the statute, because it makes the statutory distinction

between "air carrier" and "commercial operator" turn solely on the element of "holding out" to prospective customers, which is an element that is always present in commercial relationships. *Id.* at 27a. That result is anomalous because "[s]urely there is some Constitutional right to free speech for business which would encompass making known to prospective customers the availability of your services." *Id.* at 27a-28a.

ARGUMENT

1. Petitioner renews his contention that 14 C.F.R. Pt. 135 does not apply to the subject flights, because PTI was not engaged in "common carriage" as that concept was understood by the common law. According to petitioner, the common law understood a common carrier to be "one who holds out a willingness to carry, at a fixed rate, all persons applying for air transport, so long as there is room in the aircraft." Pet. 8. He contends that the "fixed rate or tariff is the linchpin of the requirement that a common carrier serve its customers 'indiscriminately.'" *Ibid.* Petitioner's claim warrants no further review.

The court of appeals correctly concluded that the definition of common carriage in FAA Advisory Circular No. 120-12A (Apr. 24, 1986) "is in relevant respect the same as that found at common law," Pet. App. 17a, and that under both the common law and the Advisory Circular the "crucial determination in assessing the status of a carrier is whether the carrier has held itself out to the public or to a definable *segment* of the public as being willing to transport for hire, indiscriminately." *Id.* at 18a-19a.

That focus on a willingness to serve the relevant market segment "indiscriminately" is consistent with a number of cases holding that the "dominant factor in fixing common carrier status at common law is the presence of a 'holding out.'" *Las Vegas Hacienda, Inc.* v. *CAB*, 298 F.2d 430, 434 (9th Cir.) (citing cases), cert. denied, 369 U.S. 885 (1962). The test is an objective one, relying upon what the carrier actually does rather than the label that the carrier attaches to its activities, or the purpose behind those activities. *Id.* at 434. The guidelines set forth in the Advisory Circular are amply supported by the aviation-related case law, and merely state succinctly what may be gathered from those cases. See, *e.g.*, *East Coast Flying Service, Enforcement Proceeding*, 46 C.A.B. 640, 642-644 (1967), and cases cited therein.

While petitioner appears to agree that the court of appeals correctly held that the common law required "indiscriminate service," he contends (Pet. 8-10) that the court erred in failing to recognize that the essence of indiscriminate service is the use of a fixed rate or tariff. Petitioner's contention is erroneous. Consistent with the common sense understanding of the phrase, "indiscriminate service" merely connotes a willingness to serve all those members of the relevant market who are willing to pay the price demanded, without the exercise of selectivity within that market. Thus, the FAA's Advisory Circular is correct in stating that the "[a]bsence of tariffs or rate schedules, transportation only pursuant to separately negotiated contracts, or occasional refusals to transport, are not conclusive proof that the carrier is not a common carrier." Pet. App. 57a; see also *Las Vegas Hacienda*, 298 F.2d at 434 (existence of a

contract negotiated for a special price does not alone suffice to make the carrier a private carrier); *Southeast Airlines, Enforcement Proceeding*, 32 C.A.B. 1281, 1284-1285 (1961) ("the test of common carriage is the nature of the holding out to the public, not the uniformity of the rates charged the public").

The NTSB correctly concluded that PTI was a common carrier under the appropriate test. There is ample evidence in the record that PTI had "held itself out as being willing to serve all members of the music industry who were able to pay for its services." Pet. App. 21a. There is no evidence that PTI ever turned away any member of the music industry who could pay PTI's fees. Based on those facts, the NTSB was justified in concluding that PTI acted as a common carrier and was subject to the Federal Aviation Regulations, 14 C.F.R. Pt. 135.[1]

2. There is no merit to petitioner's contention that the court of appeals' decision, by failing to require proof that PTI always used a fixed rate or tariff, conflicts with a number of decisions of this Court and of other courts of appeals that have adverted to that factor. As recognized by the court of appeals, "[m]ost of these cases involve definitions of common carriage developed outside the context of aviation law." Pet. App. 19a. See *Louisville & N.R.R.* v. *United States*,

---

[1] Petitioner also contends that the "record in this matter also demonstrates the clear violation of all operators' First Amendment commercial speech rights by enforcement of the FAA definition." Pet. 10-11. The FAA's definition does not forbid petitioner from engaging in any speech; it merely requires PTI's crews to possess a particular level of training and applies higher safety standards to many facets of the operation.

282 U.S. 740 (1931) (railroads); *Terminal Taxicab Co.* v. *Kutz*, 241 U.S. 252 (1916) (taxicabs); *Semon* v. *Royal Indemnity Co.*, 279 F.2d 737 (5th Cir. 1960) (fishing boats); *Home Insurance Co.* v. *Riddell*, 252 F.2d 1 (5th Cir. 1958) (trucks). The court of appeals correctly recognized that the most important source of law in this case is the common law "relating to air carriers" (Pet. App. 14a), which is consistent with the guidelines in the FAA's Advisory Circular. Petitioner makes no serious claim that the decision below conflicts with any case addressing the issue in the aviation context.[2]

3. Petitioner also claims (Pet. 12-13) that the FAA should have adopted its definition of "common carriage" through the rulemaking process of the Administrative Procedure Act (APA), 5 U.S.C. 553, because the Advisory Circular's definition of "common carriage" supersedes the long-standing common-law definition. As the court of appeals correctly recognized (Pet. App. 17a), the premise of that contention is wrong, because "the definition of common carrier provided [in the Advisory Circular] is in relevant respect the same as that found at common law." The court's conclusion is confirmed by the

---

[2] Petitioner's reliance (Pet. 8) on *Jackson* v. *Stancil*, 116 S.E.2d 817 (N.C. 1960), is misplaced. As the court of appeals noted in this case, the North Carolina Supreme Court in fact applied a "multivariate" test for common carriage, in which the dispositive factor was not whether the carrier charged uniform rates or agreed to carry all passengers for whom its aircraft had room, but whether the carrier "held itself out to the public as being available for service." Pet. App. 18a n.21 (emphasis omitted) (citing *Jackson* v. *Stancil*, 116 S.E.2d at 824).

Advisory Circular itself, which notes that " '[c]ommon carriage' and 'private carriage' are common law terms," and that the circular merely provides guidelines as to their meaning. *Id.* at 57a. This Court has repeatedly recognized that administrative agencies may publish such enforcement guidelines, and that those informal guidelines, while "not entitled to the same deference as norms that derive" from formal rulemaking pursuant to delegated powers, "are still entitled to some weight on judicial review." *Martin* v. *OSHRC*, 499 U.S. 144, 157 (1991).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

ROBERT S. GREENSPAN
SANDRA WIEN SIMON
Attorneys

APRIL 1994

---

[3] Petitioner does not claim prejudice from any lack of notice of the Advisory Circular. Indeed, the court of appeals found that petitioner "was aware of the definition of 'common carriage' provided by the FAA in its Advisory Circular." Pet. App. 15a.